Nos 395 & 396

Brief of Kirlin for Appellants

Supreme Court of the United States.

OCTOBER TERM, 1899.

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395.

THE SPANISH SMACK PAQUETE HABANA,
JUAN PASOS, CLAIMANT, APPELLANT,

vs.

THE UNITED STATES, LIBELANT, APPELLEE.

396.

THE SPANISH SCHOONER LOLA,
TOMAS BETANCOURT, CLAIMANT, APPELLANT,

vs.

THE UNITED STATES, LIBELANT, APPELLEE.

BRIEF FOR THE APPELLANTS.

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IN THE

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BRIEF FOR CLAIMANTS, APPELLANTS.

These are appeals from decrees of the district court of the United States for the southern district of Florida in two fishing-smack cases, which for convenience may be argued together.

Both vessels were condemned as prize of war, and stipulations have been entered into between the claimants and the Government that the *Paquete Habana* shall be decisive of one other case and the *Lola* of nine other cases of vessels similarly situated. The stipulations are printed in the appendix to this brief (pp. 68, 69.)

The Paquete Habana.

This vessel was condemned in a final decree entered May 30 (Rec., pp. 14 and 15). The ground of the condemnation was that " the sloop and her cargo were enemy's property " (p. 15).

There had been a previous decree on default, filed May 26 (Rec., p. 12), in which the grounds of condemnation had been stated as (1) enemy's property, (2) attempting to violate the blockade of Havana. That decree was set aside and vacated by an order entered May 28 (Rec., pp. 12 and 13), which granted leave to the owner of the vessel to file a claim in the name of the master on or by May 30, 1898.

On May 28 a claim was duly filed by Juan Pasos, master and lawful bailee, intervening for the interest of Justa Galban, widow, in the vessel and in the fish that she carried, alleging that at the time of the capture the said Justa Galban, widow, was the *bona fide* owner of the vessel and of one-third of the fish which constituted her cargo, and that the other two-thirds of the fish belonged to the claimant and the other members of the crew, all of whom were Cubans, who, prior to the recognition of Cuban independence, were Spanish subjects. He further alleged that the vessel and cargo, under the general law and the proclamation of the President of April 26, 1898, were privileged and exempt from capture and condemnation as a fishing vessel with her catch, and he denied that the vessel and the fish were lawful prize of war (p. 13).

On the same day Juan Pasos filed a test affidavit, in which he swore that he was master of the *Paquete Habana*, that the vessel belonged to Justa Galban, widow, of Havana, a native-born Cuban, domiciled in Cuba at the time of the recognition of the independence of the Cuban people by Congress, and that the vessel was used exclusively in the coast waters of Cuba for catching small fish.

He further stated that the keel-length of the vessel was about 43 feet; her tonnage about 25 tons; that the fishing was done on shares, one-third of the catch belonging to the owner and two-thirds to the crew; that the fish then on board were so owned, and that they were kept and sold alive; that he left Havana on the last trip on March 25, 1898, and proceeded to Cape San Antonio, on the coast of Cuba, in coast waters, between reefs, and fished there twenty-five days, and then started back to Havana with the catch. The sloop was stopped by the blockading squadron April 25, 1898, prior to which time those on board the vessel were ignorant of the existence of war or of any blockade. She was captured by the *Castine* and brought into Key West as prize of war.

No effort was made to run the blockade after its existence became known.

The crew of the sloop consisted of three persons, including the captain. She was sloop rigged with one mast (Test Aff., Rec., p. 14).

Most of the above facts were also testified to by the master in answer to the standing interrogatories. The master had resided fourteen years in Cuba (Ans. to 1st Int.). The *Paquete Habana* was a coasting vessel, the master having a license to fish, issued by the Spanish government (Ans. to 2d Int.). The vessel was captured near Mariel, being then bound towards Havana. She sailed under the Spanish flag, and had no other colors on board. There was no resistance made at the time of the capture (Ans. to 3d Int.). The master took command of her last at Havana, March 5, 1898, the owner, Justa Galban, delivering possession to him. The vessel was of twenty-five tons burden, and carried three mariners, including himself. One-third of the catch belonged to the owner and the other two-thirds to the crew. The boat was built in Key West (Ans. to 6th Int.). The boat was a fishing smack, and was engaged in running out of Havana for fishing trips (Ans. to 7th Int.). She had a cargo of

fish when captured; the crew caught the fish out of the sea; they had forty kintals of fish on board at the time of the capture (Ans. to 8th Int.). The owner of the vessel is Justa Galban, widow; she lives in Havana, and is a Spaniard by birth (meaning born under Spanish rule; see test affidavit, p. 14). She had been in possession of the vessel for five years. The cargo was taken from Spanish (meaning Cuban) waters (Ans. to 21st Int.). She was sailing towards Havana when she was captured, and was distant from it about 11 miles (Ans. to 29th Int.).

It is apparent from the foregoing evidence that the sloop was a fishing boat of the most innocuous type, and that there was no attempt or design to violate the blockade. In the final decree the sole ground of condemnation was "that the said sloop *Paquete* and her cargo are enemy's property" (p. 15).

The Lola.

The *Lola* was a fishing vessel of 55 tons burden, schooner-rigged, and carried a crew of six, including the master (Ans. to 5th Int.). She was captured near Bahia Honda, on April 27, by the *Dolphin* (Ans. to 3d Int.). She had on board about ten thousand pounds of live fish (Ans. to 8th Int.), which were caught in the waters off the coast of Cuba (Ans. to 21st Int.). As in the preceding case, a one-third interest in the fish belonged to the owner and the remaining two-thirds to the crew (Ans. to 6th Int.). At the time of the capture she was steering her course towards Bahia Honda. The master further says:

"On the day before I was captured, viz., 26th day of April, 1898, I was captured [stopped?] by the U. S. S. *Cincinnati* and warned not to go in Havana; I changed my course and put for Bahia Honda, where, I was told, I would be allowed to land. The next morning the U. S. S. *Dolphin* came up and took the ship" (Ans. to 29th Int., p. 11).

The master probably misunderstood those on the *Cincinnati*, who, doubtless, told him that he could land *beyond* Bahia Honda, that being the easterly end of the blockade (Proclamation of Blockade, April 22, 1898).

The owner of the vessel is Severo Gonzales, a resident of Cuba. This owner delivered the vessel to the present master, who had been in command of her about four years (Ans. to 4th Int.). Gonzales had owned the boat for about ten years, and had lived in Cuba "for a long time" (Ans. to 9th Int.).

The boat was libeled on the 30th of April, and the process against her was returned on the 18th of May. A decree of condemnation by default, not contained in the record, was entered, but by an order dated May 30 leave was granted on that date to the owners of the vessel to file a claim in the name of the master on or before May 30 (Rec., p. 12).

On May 28 a claim was filed by Tomas Betancourt, the master and lawful bailee, alleging that the vessel and one-third of the catch were owned by Gonzales, and that the remaining two-thirds of the fish belonged to the crew, all of whom were Cubans, who prior to the recognition of Cuban independence were Spanish subjects. He further alleged, that under the general law and under the proclamation of the President of April 26, 1898, the vessel and her catch were exempt from capture and condemnation, and he denied that the vessel and the fish were lawful prize of war.

In the test affidavit filed by the master on the same day he reaffirmed his statement that the vessel belonged to Gonzales, a native of Cuba, who was domiciled there at the time of the recognition of the independence of the Cuban people by Congress, and that she was used exclusively in the gulf of Mexico for catching small fish. The keel of the vessel was stated to be 51 feet and her tonnage 35 tons; the fishing, he averred, was done on shares, one-third belonging to the owner and two-thirds to the crew, and the fish on

board at the time of capture were so owned. The fish were kept and sold alive.

It is further shown that the vessel left Havana on her last trip April 11, 1898, and proceeded to Campeche Sound, on the coast of Yucatan, where they had fished for eight days. They were returning to Havana with the fish at the time of the capture, and were stopped by the blockading squadron near Havana on April 26. Prior to said time they were unaware of the existence of war or of any blockade, and no effort was made by the vessel to run the blockade after they learned of its existence (Test Affidavit, pp. 13 and 14). The vessel was of schooner rig, had two masts, and carried six persons, including the captain (p. 14). The ground of condemnation stated in the final decree was "that the said schooner *Lola* and her cargo were enemy's property" (pp. 11 and 12).

The only point of difference between the two cases appears to be that the *Paquete Habana* caught her fish close in shore in Cuban waters, while the fish caught by the *Lola* came from the Mexican side of the Yucatan passage.

Due appeal was taken in both cases, and the leading errors assigned in both are:

First. That the court omitted and refused to hold that the vessels were not subject to condemnation as lawful prize of war.

Second. That the court omitted and refused to find that the vessels, whilst engaged in fishing, as disclosed in the record, were exempt from capture by the terms of the President's proclamation, dated April 26, 1898, providing that the war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, under which fishing vessels in the situation of the *Paquete Habana* and the *Lola* at the time of their capture are exempt from seizure as prize.

Third. That the court omitted and refused to hold that the vessels and cargoes were the property of Cubans, whose freedom and independence were recognized by the joint resolution of Congress approved April 20, 1898, and entitled, accordingly, to exemption from capture as the property of neutrals or persons entitled to the rights, privileges, and immunities of neutrals.

Fourth. That the court omitted and refused to allow further proofs of the grounds of exemption from capture and condemnation set forth in the claim and test affidavits.

POINT FIRST.

INTERNATIONAL LAW DOES NOT SANCTION THE CAPTURE AND CONDEMNATION OF BOATS EXCLUSIVELY ENGAGED IN THE COAST FISHERIES.

By the opening words of the President's proclamation of April 26, 1898, reciting the fact of war with Spain, it was declared to be "*desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice*" (30 Stat., p. 1770).

The adhesion of the Government to the declaration of Paris was announced and further dispositions were made as to the status of enemy property at sea in the line of liberal modern practice.

In short, the United States publicly declared that its policy was in full accord with the principles of modern international law.

The sources from which the law to govern the present cases must be derived are various. But few actual decisions can be referred to, and those are quite remote in time from the present, yet there are, it is believed, fixed practices of long duration bearing on the question, including the previous definite attitude of our own Government, publicly

known, in at least one former war, and an almost, if not quite, uniform consensus of opinion among publicists and international law writers to the effect that such practices have now become definitely crystallized into well-settled law.

Before proceeding to quote fully from the writers whose views, as we conceive, are authoritative on the point, it will not be inappropriate to inquire briefly as to the legitimate weight of such expressions as statements of the real international law. This can be done in no better way than by quoting from the learned judgment of Sir R. Phillimore, himself a distinguished authority on the general subject in the noted case of *The Queen vs. Keyn* (2 Exch. Div., 63, 68–70), where he said:

"In the memorable answer, pronounced by Montesquieu to be *réponse sans réplique*, and framed by Lord Mansfield and Sir George Lee, of the British to the Prussian government, 'The law of nations is said to be founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage.' It is more especially to this usage, as evidencing the consent of nations, that great judges, such among others, as Lord Stowell and Chancellor Kent, and great jurists of all countries, have continually referred. 'It has been contended,' Lord Stowell says, 'that such a sentence is perfectly legal, both on principle and authority. It is said that on principle the security and consummation of the capture is as complete in a neutral port as in the port of the belligerent himself. On the mere principle of security it may perhaps be so, but it is to be remembered that this is a matter not to be governed by abstract principles alone; the use and practice of nations have intervened, and shifted the matter from its foundations of that species; the expression which Grotius uses on these occasions (*placuit gentibus*) is, in my opinion, perfectly correct, intimating that there is a use and practice of nations to which we are now expected to conform' (*The Henrick and Maria*, 4 C. Rob., 54, 55). With respect to 'justice, equity, convenience and the reason of the thing,' one particular class of authority has been much relied upon in the arguments of counsel, namely,

the treatises of learned writers on law, and it is perhaps in this case especially important to assign a proper, and not an extravagant, value to these digests of the principles of public and international jurisprudence. 'All writers upon the law of nations unanimously acknowledge it,' was a fact that weighed greatly with Lord Stowell in the case of the *Maria*, which established the belligerent's right of search.

"Mr. *Wheaton* says: 'Text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent, are placed as the second branch of international law' (*Elem. of Int. Law*, vol. i, p. 59).

"*Lord Mansfield*, deciding a case in which ambassadorial privileges were concerned, said that he remembered a case before Lord Talbot, in which he 'had declared a clear opinion that the law of nations was to be *collected from the practice of different nations and the authority of writers.* Accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, &c., there being no English writer of eminence upon the subject.'

"Chancellor *Kent* says: 'In cases where the principal jurists agree the presumption will be very great in favor of the solidity of their maxims, and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers of international law' (*Kent's Com.*, vol. i, p. 19).

"*Ortolan* (*Dipl. de la Mer*, 1, 1, p. 74) has some very sensible remarks on this subject, which he thus concludes: 'Ces publicistes ont non seulement fourni, pour la gestion des affaires extérieures, une branche de droit international, qui supplée aux lacunes des autres et avertit de leurs vices, mais ils ont même contribué puissamment à la formation et à l'amélioration graduelle du droit international positif.'

"It is also the opinion of a very learned living jurist (*Dr. Franz von Holzendorf, Encycl. der Rechtsw. IV, Das Europäische Völkerrecht, p.* 935) that the usage and practice of international law is in great measure founded upon the tardy recognition of principles which have been long before taught and recommended by the voice of wise and discern-

ing men, and that thus the fabric of international jurisprudence has been built up."

Carrying in mind this exposition and acknowledgment of the just sources of international law, the subjoined extracts from text writers, "founded upon justice, equity, convenience, and the reason of the thing" as well as upon the well-established custom of maritime nations, will serve to show the true status of boats engaged in the coast fisheries.

The doctrine that coast fishing vessels are exempt from capture is by no means modern.

In *Froissart's Chroniques* (vol. 3, p. 41) it is said:

' Pescheurs sur mer, quelque guerre qui soit en France & Angleterre, jamais ne se firent mal l'vn à l'autre; aincois sont amis, & s'aydent l'vn à l'autre au besoin."

Rymer's Foedera (vol. VIII, p. 451) has the following Royal order * under date of October 5, 1406:

"De Securitate pro Piscatoribus.

"Rex, universio et singulio Admirallis &c. Salutem.

"Sciatio quod, quibusdam certio de causis, nos ad præsens moventibus, suscepimus & per Præsentes ponimus & suscepimus, in salvum & securum Conductum nostrum, ac in Protectionem Justicum & Defensionem nostras speciales,

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* "*Rymer's Foedera*, VIII, p. 451.

"Concerning the Safety of Fishermen.

"The King to each and every admiral, greeting:

"Be it known, that for various reasons, we being for the present so inclined, have undertaken and by these presents do establish and decree that under our protection and safe conduct and under our particular charge and care, each and all the fishermen of France, Flanders and Britanny, together with their boats and fishing tackle, may, but only for the purpose of carrying on their fishing, freely and lawfully sail about and travel back and forth and may fish, drift and linger anywhere upon the sea, through and within our domain, limits and territory, and with

universos et singulos Piscatores Franciæ & Flandriæ & Britanniæ, cum Navibus & Batellis suis Piscatoriis, ubicumque supra mare, per & infra Dominia Jurisdictiones & Districtus nostra, pro eorum Piscatione dumtaxat facienda, Velando, Transiundo & Proficiscendo, libere & licite Piscando, Morando, Continuando & cum Piscibus imbri captis, ad partes suas proprias, absque molestia seu impedimento quoqumque, Redeundo, nec non Pisces, Retia ac alia Res & Bona sua quæcumque.

"Et ideo vobis & cuilibet vestrum, mandamus quod Piscatores illos &c. mutatis mutandis ut prædictum est, Redeundo non inferentes eis &c.

"Dum tamen iidem Piscatores & eorum quilibet bene & honeste se gerant, ac quicquam quod in nostri comtemptum & Præjudicium, aut Regni nostri Angliæ, seu Ligeorum nostrorum ejusdem, dampnum & Inquietationem cedere valeat calore Præsentium, non faciant nec attemptent, aut facere vel attemptare præsumant quovis modo.

"Per IPSUM REGEM."

[Dated Oct. 5, 1406, at Westminster.]

The only reported case in which a fishing vessel has been condemned in the English courts is that of the *Young Jacob*, 1 C. Rob., 20. This was the case of a small Dutch vessel taken in April, 1798, on her return from the Dogger Bank to Holland. The real ground of the condemnation seems to have been that the boat was believed to be in the active

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the fish which have been caught in the water, return to their own districts without any interference or obstacle whatever, either to their fish, their nets or any of their belongings.

"Therefore we command you and each of you, not to interfere with the return of such fishermen &c. *mutatis mutandis*, as has been set out above.

"But on the other hand such fishermen and those of them who comport themselves well and properly must not under pain of these presents, do, or undertake, or in any way whatever attempt to do, or undertake, anything which might work to our prejudice or disadvantage or our injury or disturbance, either in our Kingdom of England or in that of our allies.

"By the KING'S OWN HAND."

"Under date of Oct. 5, 1406, at Westminster."

service of the enemy, carrying information acquired in the pretense of fishing. Sir W. Scott said:

"In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment and, as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade. * * * It is a farther satisfaction to me in giving this judgment to observe that the facts also bear strong marks of a false and fraudulent transaction."

This decision, if it can properly be viewed as the case of a vessel entitled to claim the time-honored exemption of purely fishing vessels, was quite contrary to the prevailing practice on the Continent at the same epoch. Whatever is deemed to be the real ground on which the condemnation of the *Young Jacob* was decreed, it was felt to be a disturbing factor in the treatment which it was desirable to extend to fishermen, and consequently, on May 23, 1806, an order in Council was issued which nullified its force as a precedent and restored the fishermen's former status:

"It is this day ordered in Council that all fishing vessels under Prussian and other colors and engaged for the purpose of catching fish and conveying them fresh to market with their crews, cargoes and stores, shall not be molested on their fishing voyages and bringing the same to market; and that no fishing vessels of this description shall hereafter be molested. And the Right Honorable the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty and the Judge of the High Court of Admiralty are to give the necessary directions herein as to them may respectively appertain" (5 C. Rob., 408).

Douglas Owen, in his *Declaration of War* (London, 1889), comments upon that case and the subsequent order as follows:

"Formerly fishermen engaged in their occupation were deemed non-combatants and their property exempt from capture, but Sir W. Scott in the *Young Jacob* (1 Rob., 20), observing that the rule was one of comity and not of law, condemned the vessel as being constantly and exclusively employed in the enemies' trade. But by an Order in Council dated May, 1806, all fishing vessels engaged for the purpose of catching fish and conveying them fresh to market with their crews, cargoes and stores were declared to be free from molestation."

There is no record of the capture of fishing vessels in any of the English reports since the Order in Council of 1806 went into operation.

The latest word on the subject, dealing with the English and American practice, is spoken by Professor *Lawrence* in his valuable *Principles of International Law* (1895), § 206, p. 383:

"As a general rule, private vessels of the enemy may be captured wherever they are found, as long as they are not in neutral waters. There are, however, certain exceptions, some of which rest upon usage so constant and so conformable to the more humane character of modern warfare that we may almost venture to say that they are embodied in the international code, while others have not progressed beyond the stage of comity, and could be ignored by a belligerent State without bringing down upon itself the charge of lawlessness. The exemption of fishing-boats from capture is a somewhat debatable point. Deep-sea fishing vessels are treated like other enemy ships, but a practice of allowing the inshore fishermen of both belligerents to pursue their avocations without molestation has become very general. France holds that it is obligatory. The British doctrine that it is a rule of comity only was laid down by Lord Stowell in the case of the *Young Jacob and Joanna* (1 Rob., 20). The United States, under the influence of Franklin, pledged themselves to exemption

in their treaty with Prussia of 1785, and the stipulation to that effect was renewed in 1799 and again in 1828. The difference between the English and the French view is more apparent than real, for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own State, and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France when Great Britain gave the order to capture them in 1800."

To the same effect: *Walker, International Law* (1893), p. 316.

The *cause célèbre* on the subject in the French courts is that of the Portuguese smack *La Nostra Segnora de la Piedad y Animas*, which was captured in 1801 by the French privateer *Carmagnole* three leagues out to sea opposite Tavira, and was subsequently ordered to be restored. The decision proceeds upon the distinct acknowledgment of the principle that fishing-boats are not considered hostile, and by the settled law of nations are exempt from capture and condemnation. It is reported in full in *Merlin's Repertoire Universel et Raisonné de Jurisprudence* (Brussels, 1827, vol. 25, p. 58), and, with the author's comments on the general subject, is as follows: *

"Les bateaux pêcheurs sont-ils, comme les autres bâtimens de guerre et de commerce, sujets au droit de prise maritime? Ils devraient l'être, si l'on ne consultait que le droit des gens primitif; mais ils en sont affranchis par une sorte de convention tacite entre toutes les nations européennes. Cet affranchissement a néanmoins été contesté par les armateurs du corsaire français *la Carmagnole*, qui avait

* MERLIN, vol. 25, p. 58:

"Are fishing boats, like other vessels of war and commerce, subject to the right of maritime capture?

"They should be if the primitive international law were alone consulted, but they are freed from it by a sort of tacit convention between all the European nations.

"This freedom was nevertheless contested by the owners of the French privateer *La Carmagnole*, which had captured at sea, the 27th Floreal year IX, the Portuguese fishing vessel *Nostra Segnora de la Piedad*

pris en mer, le 27 floréal an 9, le bateau pêcheur portugais *la Nostra Segnora de la Piedad y animas.* Mais écoutons M. Duffaut, dans les conclusions qu'il a données sur cette prise, le 9 thermidor de la même année:

" Le monument le plus ancien que nous ait conservé sur ce point le Code des Prises, est une ordonnance, du 1er octobre 1692, rendue sous le règne de Louis XIV. A cette époque la neutralité parfaite de la pêche était reconnue. L'ordonnance du 1er octobre éloignait, a la vérité, de nos parages, les pêcheurs anglais; mais elle accordait à ceux qui y seraient rencontrés, un sauf-conduit de huit jours pour retourner chez eux; et cette mesure, que les circonstances justifiaient, n'avait pour but que de se garantir de l'espionnage, auquel, sous prétexte de la pêche, se livrait un ennemi qui préparait déjà le bombardement de nos places maritimes, exécuté en 1694.

" Dans la guerre que la France soutint contre l'Angleterre en faveur de l'independance américaine, elle ne s'écarta point de ces principes. *Le desir que j'ai toujours eu* (porte une lettre du roi á l'amiral, en date 5 Juin 1779) *d'adoucir les calamités de la guerre, m'a fait jeter les yeux sur cette classe de mes sujets, qui se consacre au commerce de la pêche, et qui n'a pour subsistance que les ressources que ce commerce lui présente; j'ai pensé que l'example que je donnerais à mes ennemis,*

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y Animas. But let us hear M. Duffaut in the conclusions which he gave on this capture the 9th Thermidor of the same year.

"'The most ancient monument which the *Code des Prises* has kept for us on this point is an ordinance of October 1st, 1692, issued under the reign of Louis XIV. At that epoch the absolute neutrality of the fisheries was recognized. True, the ordinance of October 1st kept away English fishermen from our shores, but it accorded to those who might be found there a safe conduct for eight days to return home, and this measure, which was justified by the circumstances, had for its object merely protection against the spying, which the enemy who was even then preparing the bombardment of our ports which took place in 1694, was carrying on under pretext of fishing.

"'In the war which France maintained against England for American independence, she did not deviate from her principles. *The desire that I have always had* (says a letter of the King to the Admiral, dated June 5th, 1779) *of softening the calamities of war, has made me look after that class of my subjects who devote themselves to the fishing trade, and who have for their subsistence only the resources that this trade presents; I thought that the example which I would give to my enemies, and which can have no other principles bu*

et qui ne peut avoir d'autres principes que les sentimens d'humanité qui m'animent, les déterminerait à accorder à la pêche les mêmes facilités auxquelles je consentirais à me prêter. En conséquence, j'ai donné ordre à tous les commandans de mes bâtimens, aux armateurs et capitaines des corsaires, de ne point inquiéter, jusqu'à nouvel ordre les pêcheurs anglais, et ne point arrêter leurs bâtimens, non plus que ceux qui seraient chargés de poisson frais ; quand même ce poisson n'aurait pas été pêché à bord de ces bâtimens ; pourvu toutefois qu'ils ne soient armés d'aucune arme offensive, et qu'ils ne soient convaincus d'avoir donné quelques signaux qui annonceraient une intelligence suspecte avec les bâtimens de guerre ennemis.

" Bientôt on eut occasion de mettre en pratique les principes contenus dans cette lettre ; et l'arrêt du conseil, du 6 novembre 1780, en offre un exemple remarquable. Cet arrêt, qui renouvela les défenses portées à la date du 5 juin, fut rendu sur une opposition formée par la chambre de commerce de Dunkerque, contre une ordonnance du conseil des Prises, du 10 mai 1780, qui avait déclaré bonne la rançon du bateau pêcheur anglais *le Jean et Sara*. La chambre de commerce exposait dans sa requête, qu'aucune ville du royaume n'etait plus intéressée que celle de Dunkerque au maintien de la liberté de la pêche ; elle rappelait une lettre du ministre de la marine, du 31 mai 1778, qui contenait les intentions du

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the sentiments of humanity which animate me, would induce them to accord to the fisheries the same facilities which I would consent to allow. In consequence I have given orders to all the commanders of my vessels, to the owners and captains of privateers, not to molest English fishermen until further orders, and not to arrest their vessels nor those with cargoes of fresh fish even if the fish had not been caught from these vessels, provided always that they are not armed with any weapon of offense, and that they are not proved to have given any signals which might indicate a suspicious relation with the enemy's vessels of war.

" 'The occasion soon came to put in practice the principles contained in this letter, and the decree of the council of November 6th, 1780, offers a remarkable example thereof. This decree, which renewed the prohibitions stated under date of June 5th, was made by reason of an appeal by the Chamber of Commerce of Dunkirk against a decree of the *Conseil des Prises* of May 10th, 1780, which had declared the ransom of the English fishing boat *John and Sarah* valid. The Chamber of Commerce set forth in its petition that no city of the kingdom was more interested than Dunkirk in the maintenance of the liberty of fishing. It cited a letter of the Minister of Marine of May 31st, 1778, which contained the intentions of the King in this regard, and the French owner himself, as soon

roi à cet égard; et l'armateur français lui-même, dès qu'il fut instruit que la Prise était celle d'un bateau pêcheur, s'empressa de donner un désistement formel de ses prétentions.

" Depuis le commencement de la guerre actuelle, bien loin que le gouvernement français ait rendu sur la liberté de la pêche, des décisions opposées à celles publieés jusqu' alors, on l'a vu au contraire en étendre et en favoriser constamment les principes.

"Au mois de mars 1793, le conseil exécutif autorisa les officiers municipaux de Calais à ouvrir, avec le commandant des Dunes, une negociation tendant à l'affranchissement entier de la pêche, a trois lieues des cotes.

" En thermidor an 3, le comité de salut public renvoya sans échange tous les pêcheurs anglais qui se trouvaient dans les dépôts de la république, ne les considérant pas comme prisonniers de guerre: disposition qui renferme l'expression implicite des égards que mérite partout cette classe d'hommes, dont le travail pénible et peu lucratif, ordinairement exercé par des mains faibles ou agées, est si étranger aux operations de la guerre.

" Mais pourquoi chercher des règles de conduite dans des actes qui sont loin de nous? N'avons nous pas sous les yeux l'exemple récemment donné par le gouvernement

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as he learned that the prize was a fishing vessel, hastened to give a formal release of his claims.

" 'Since the beginning of the present war, far from having given decisions opposed to those published up to that time upon the liberty of fishing, the French government has been seen on the contrary to extend and constantly favor its principles.

" 'In the month of March, 1793, the Executive Counsel authorized the municipal officers of Calais to open negotiations with the commander of the Dunes tending to the entire freedom of fishing for three leagues from the coast.

" 'In Thermidor of year 3, the Committee of Public Safety, sent back, without exchange, all the English fishermen who were in the depots of the Republic, not considering them as prisoners of war, a disposition which contains the implied expression of the consideration deserved by this class of men, whose hard and poorly-paid work, ordinarily done by feeble and aged hands, is so foreign to the operations of war.

" 'But why seek rules of conduct in acts which are so far from us? Have we not under our eyes the example recently given by the French government when the British ministry brusquely and under vain pre-

français, lorsque le ministère britannique rompit brusquement, et sous de vains prétextes, la convention relative à la neutralité réciproque des pêcheurs, et sacrifia quelques malheureuses familles aux alarmes que lui causait la conféderation maritime du Nord? Ne l'a-t-on pas vu protester contre cette détermination violente, et manifester, par le rappel de son commissaire à Londres, l'indignation qu'elle lui causait? Ne l'a-t-on pas vu dénoncer un tel acte comme *contraire à tous les usages des nations civilisées, et au droit commun qui les régit, meme en temps de guerre, et comme donnant à la guerre actuelle un caractère d'acharnement et de fureur qui detruisait jusqu'aux rapports d'usages dans une guerre loyale? Enfin, ne l'a-t-on pas vu déclarer en même temps, qu'ayant toujours eu pour premier désir de contribuer a la pacification générale, et pour maxime d'adoucir, autant que possible, les maux de la guerre, il ne pouvait songer, pour sa part, a rendre de miserables pêcheurs victims de la prolongation des hostilités; qu'ils s'abstiendrait de toutes les représailles, et qu'il ordonnait au contraire que les bâtimens français armés en guerre ou en course, continuassent à laisser la pêche libre et sans attente?*

"Il est donc constant que les bateaux pêcheurs doivent jouir d'une franchise entiere; le gouvernement français l'a toujours ouvertement favorisée, et le cabinet de Saint-James

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texts, broke the convention relative to the reciprocal neutrality of fishermen, and sacrificed some unfortunate families to the alarm which the maritime confederation of the north caused it? Have we not seen it protest against this violent proceeding, and manifest by the recall of its commissioner at London, the indignation which this caused? Have we not seen it denounce such an act as *contrary to all the usages of civilized nations, and to the common law which controls them, even in time of war, and as giving to the present war a character of rage and fury which destroyed even the usual intercourse of a loyal war?* Finally have we not seen it declare at the same time, that *having always had for its first desire to contribute to the general pacification and for a maxim to soften as much as possible the hardships of war it could not dream for its part to render miserable fishermen the victims of the prolongation of hostilities, that it would abstain from all reprisals and that it decreed on the contrary, that French men-of-war or privateers should continue to leave the fisheries free and without attack?*

"'It thus appears that fishing boats should enjoy perfect freedom. The French government has always favored this, and the cabinet of St. James has not always disregarded it. In the course of the present war, a convention concluded between the Spaniards and the English, and signed

ne l'a pas toujours meconnue. Dans le cours de la présente guerre, une convention conclue entre les Espagnols et les Anglais, et signée des amiraux *Massaredo* et *Saint-Vincent*, statua qu'aucune hostilité n'aurait lieu contre les bateaux pêcheurs des deux nations et leur équipages, soit dans le canal de Gibraltar, soit dans la mer septentrionale.

" La règle générale ne parait susceptible d'aucune doute; elle derive du droit des gens, qui est naturellement fondé, dit Montesquieu, sur ce principe, *que les diverses nations doivent faire dans la paix le plus grand bien, et dans la guerre le moins de mal qu'il est possible, sans nuire à leurs véritables intêrêts.*

" Il ne s'agit plus maintenant que de savoir si quelque exception défavorable ne s'élève point contre le bateau portugais qui fait l'objet de cette discussion.

" Et d'abord, quoiqu'on ne puissent argumenter en sa faveur d'aucune convention particulière arrêteé avec le Portugal, je ne crois pas qu'on doive pour cela priver *la Nostra Segnora de la Piedad* d'un avantage que le gouvernément de la république, ainsi qu'on l'a vu plus haut, avait laissé généreusement aux pêcheurs anglais, moins comme un droit acquis et convenu (puisqu'il n'y a point de droit sans réciprocité, et que, dans l'hypothèse, la réciprocité, n'existait pas), que comme une chose inhérente à la qualité

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by Admirals Massaredo and St. Vincent, established that no hostile act should be directed against the fishing boats of the two nations and their crews, whether in the Strait of Gibraltar or in the Northern Sea.

" 'The general rule appears susceptible of no doubt. It flows from the law of nations which is naturally founded, says Montesquieu, on this principle, *that the different nations should do the greatest good in time of peace, and the least possible harm in time of war without doing injury to their true interests.*

" 'There only remains now to learn if some unfavorable exception arises against the Portuguese vessel which is the subject of this discussion.

" 'First, although no special convention with Portugal can be cited in its favor, I do not think that on that account the *Nostra Segnora de la Piedad* should be deprived of an advantage which the government of the Republic, as has been seen above, had generously left to the English fisherman, less as an acquired and stipulated right (since there is no right without reciprocity, and reciprocity did not exist) than as something inherent to the essentially pacific quality of the individuals, and accorded by the desire to contribute to the progress of civilization. Again, it is not accord-

essentiellement pacifique des individus, et accordé par le désir de contribuer aux progrès de la civilisation. D'ailleurs, ce n'est point user d'une faveur étrange, que d'en agir avec les Portugais comme avec les Anglais dont ils sont les alliés.

" En second lieu, *la Nostra Segnora de la Piedad*, sortie uniquement pour la pêche, uniquement occupée de ce travail tous le temps qu'elle tint la mer, ne parait pas s'être éloignée des eaux du Portugal : elle était partie de Penichi ; elle fut prise à trois lieues en mer, ayant le cap sur Tavira. Les declarations du capitaine *los Santos* s'accordent parfaitement avec le procès-verbal de capture ; et toute la déposition de ce capitaine porte un caractère de simplicité et de bonne-foi qui inspire d'autant plus de confiance, qu'il n'a fait aucune reclamation ; et que, dans l'ignorance complète des principes qui le protégeaient, il n'a point cherché à éluder la peine qu'il croyait intimement attachée à sa qualité de sujet d'une puissance ennemie.

" D'un autre coté, ce mistic n'avait point d'armes, et son équipage ne présentait pas un nombre d'hommes supérieur à celui qu'exigeaient la manœuvre, un travail de plusieurs jours, et le service des filets.

" On ne peut également concevoir aucun soupçon de l'état de salaison ou se trouvait le produit de la pêche. Cette pre-

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ing a signal favor to act towards the Portuguese in the same way as toward the English, of whom they are the allies.

" 'In the second place, the *Nostra Segnora de la Piedad* going out solely for fishing, and occupied solely in this work all the time she was at sea does not appear to have removed from Portuguese waters. She had sailed from Penichi ; she was taken three leagues out at sea, opposite Tavira. The declarations of Captain Los Santos accord perfectly with the official report of the capture, and the whole deposition of this captain has a character of simplicity and good faith which inspires the more confidence as he makes no claim and as in complete ignorance of the principles which protected him, he has not sought to escape the penalty which he thought strictly attached to his quality of subject of a hostile power.

" 'Again, this lugger had no arms, and its crew did not consist of more men than were necessary for navigating, for the handling of the nets, and for several days' work.

" ' Nor can any suspicion arise by reason of the pic kling of the products of the fishing. This precaution was necessary to protect the fish from the effects of the heat ; nor can this fish, caught by the hands of labor, be likened to the ordinary material of cargoes, nor considered as the product of trade. Perhaps it might have been destined to become such,

caution était necessaire pour mettre le poisson à l'abri des effets de la chaleur: recueilli par des mains laborieuses, ce poisson ne peut également être assimilé à la matiere ordinaire des cargaisons, ni consideré comme provenant du commerce. Peut être était-il destiné à y entrer; mais on n'aura point perdu de vue que la lettre du 5 juin 1779, que j 'ai citeé, fut écrite en faveur de cette classe qui se consacre au commerce de la pêche, et qui n'a pour subsistance que les ressources que ce commerce lui presente; expressions qui indique clairement que le législateur n'a pas voulu se borner envers les pêcheurs à de stériles demonstrations d'humanité.

" D'apres ces considérations, je conclus a la restitution du bateau pêcheur *la Nostra Segnora de la Piedad y animas.*"

" Le même jour, décision, au rapport de M. Moreau, par laquelle 'le conseil, faisant droit sur les conclusions du commissaire du gouvernement, et adoptant les principes d'humanité et les maximes du droit des gens qui y sont developpés, ordonne que le bateau pêcheur *la Nostra Segnora de la Piedad y animas*, amené à Cartaya par le corsaire français *la Carmagnole*, ensemble le poisson qu'il renfermait, ou le produit net de la vente qui aurait pu en être faite, seront restitués au maitre et patron du bateau pêcheur, ou à son fondé de pouvoirs pour en disposer ainsi qu'il avisera; à quoi faire, tous gardiens, séquestres et dépositaires seront contraints même par corps, quoi faisant, dechargés.' "

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but it must not be forgotten that the letter of June 5th, 1779, which I have cited, was written in favor of *that class engaged in the fisheries, and which has for its subsistence only the resources which that trade affords*, expressions which clearly indicate that the legislator did not wish to limit himself with regard to fishermen to fruitless demonstrations of humanity.

" 'From these considerations I come to the conclusion that the fishing boat *La Nostra Segnora de la Piedad y Animas* should be restored.'

"The same day decision on the report of M. Moreau by which 'the council agreeing with the conclusions of the government commissioner and adopting the principles of humanity and the maxims of the law of nations which are there spread out, orders that the fishing boat *La Nostra Segnora de la Piedad y Animas*, brought into Cartaya by the French privateer *La Carmagnole*, together with the fish on board, or the net product of the sale which may have been made thereof, shall be restored to the master of the fishing boat, or to his duly appointed attorney to dispose of as he may see fit, to do which all guardians, keepers and depositaries shall be compelled, by force if necessary, and the same having been done, are discharged.' "

The more modern writers make no mention of other decisions of courts touching the point, but confine their statements to an account of the recent practices of nations on the general subject and the announcement of what is considered the present settled law.

Reference will now be made to some of the German and French authors writing since 1850 and down to the present time, and to the practice in the last war before our own—that between Japan and China:

Heffter, Das Europäische Völkerrecht* (6th ed., 1873), section 137, says:

"Dehnt sich der Krieg auch auf die See aus, so sind nicht allein die Schiffe der feindlichen Staatsgewalten gegenseitig dem Rechte der Eroberung und Aneignung unterworfen, sondern man legt sich auch eine unbedingte Appropriationsbefugniss gegen feindliche Privatschiffe und Güter bei wovon man nur etwa die Fahrzeuge und Geräthschaften der Fischer an den Küsten menchenfreundlich ausnimmt desgleichen schiffbrüchige und verschlagene Güter."

And in a note to this section:

"In Frankreich haben sich die Gerichte dem Herkommen gemäss (*Ortolan* II, 49) sehr bestimmt dahin ausgesprochen, dass nicht einmal zur Ausübung von Repressalien Fischerboote des Feindes als gute Prise behandelt werden dürften," citing *Sirey*, Rec. gén. I, 2, 331; *Merlin, Repert Univ.* M. "*Prise Maritime.*"

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* Heffter. European International Law.

"Sec. 137. If the war also extends to the sea, not only are the vessels of the hostile executive powers mutually subject to the right of conquest and confiscation, but there is also added an absolute right of appropriation in regard to the private ships and goods of the enemy, from which there are only excepted by way of humanity, the vessels and implements of coast fishermen, together with cases of shipwreck and shipwrecked goods.

"In France tribunals have very positively expressed themselves in conformity to this question, and hold that not even by way of reprisal could fishing boats of the enemy be treated as good prize."

Kaltenborn, Europäische Seerecht* (1851), vol. II, p. 480, ch. IX, "Rechte des Seehandels im Seekriege," says:

"Ausgenommen von der Beschlagnahme und Confiscation feindlicher Güter pflegen in der Praxis der vornehmsten Staten zu sein—

"(1) Die Fahrzeuge und Geräthschaften der Fischer an den Küsten" (citing Heffter's note *supra* verbatim).

Perels,† *Das Internationale öffentliche Seerecht* (1882), p. 216, says:

Die Exemtion des Seefischereigewerbs von dem Seebeuterecht darf auch für das heutige positive Völkerrecht als durch wohlbegründete Gewohnheit feststehend erachtet werden.

Bluntschli, Das Moderne Völkerrecht‡ (1872), sec. 667, says:

Die Fischerboote der Angehörigen des feindlichen States dürfen nicht als Prise Weggenomen werden.

"In dieser Ausnahme, welche die Kriegsitte macht, und insbesondere von den französischen Gerichtshöfen in weitestem Umfang geschützt wurde (vgl. Heffter, sec. 137), bricht das natürliche Recht durch, welches zur allgemeinen Regel zu werden geeignet ist. Wenn die Fischerboote zu kriegerischen Zwecken dienen, dann sind sie der Wegnahme ausgesetzt, aber nicht, so lange sie von dem friedlichen Berufe der Fischer benutzt werden."

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* KALTENBORN, EUROPEAN LAW OF THE SEA (1851), vol. II, p. 480, ch. IX, "Law of Maritime Commerce in Maritime War," says:

"In the practice of the leading States it is customary to except from the seizure and confiscation of enemy goods—

"(1) The vessels and implements of coast fishermen" (citing Heffter's note *supra* verbatim).

† PERELS, INTERNATIONAL PUBLIC LAW OF THE SEA (1882), p. 216:

"The exemption of the fishing trade from the law of prize in modern positive international law may be considered as well established through well-founded custom."

‡ BLUNTSCHLI, MODERN INTERNATIONAL LAW (1872), sec. 667:

The fishing boats of subjects of hostile countries are not allowed to be captured as prize.

"The natural law which should properly become a universal rule breaks through in this exception which is made by the custom of war, and which has been protected especially by the French courts of justice to the widest extent (see *Heffter*, sec. 137). If the fishing boats serve war-like purposes, then they are exposed to capture, but not so long as they are used in the peaceful calling of fishermen."

The later French authors lay down the rule of exemption for fishing vessels in equally emphatic terms.

De Cussy, Phases et Causes Célèbres du Droit Maritime des Nations* (1856), Book I, title III, § 36, vol. I, p. 291, says:

"En temps de guerre, la liberté de la pêche est respectée par les belligérants: les bateaux pêcheurs sont considerés comme neutres; ils ne sont soumis, en droit comme en principe, ni à la capture, ni à la confiscation.

"Dans le livre II chap. XX nous ferons connaître plusieurs faits et plusieurs décisions qui prouvent que *la liberté* et *la neutralité parfaites* des bâteaux pêcheurs ne sont point illusoires."

De Cussy (vol. 2, p. 164), Book II, devotes an entire chapter (XX) to the subject, "De la Liberté et de la Neutralité Parfaite de la Pêche," from which we extract the following:†

"Si l'on ne consultait que le droit des gens positif, les bateaux-pêcheurs seraient soumis, comme tout autre bâti-

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* DE CUSSY, vol. I, p. 291: "In time of war, the freedom of the fisheries is respected by the belligerents: fishing boats are considered as neutral: by law, as in principle, they are subjected neither to capture nor to confiscation.

"In Book II, chap. XX, we shall make known several instances and decisions which prove that *the freedom* and *the complete neutrality* of fishing boats are not illusory."

† DE CUSSY, vol. II, p. 164: OF THE FREEDOM AND COMPLETE NEUTRALITY OF THE FISHERIES.

"If positive international law alone were consulted, fishing boats would be subjected, like all other merchant vessels, to the law of prize; a sort of tacit agreement between all the European nations frees them from it, and several official declarations have confirmed this privilege in favor 'of a class of men whose hard and poorly paid work, ordinarily performed by feeble and aged hands, is so foreign to the operations of war.'

"This is the doctrine professed by the committee of public safety of the French Republic when it sent back without exchange the English fishermen who were in France in the month of Thermidor, year III (July, 1796), not considering them as prisoners of war.

"Already, toward the middle of the 17th century, the complete neutrality of the fisheries was admitted as a principle of maritime international law, and Louis XIV, while keeping away from the coast of France the English fishermen whom he suspected of acting as spies by his ordinance of October 1, 1692, granted to the fishermen who should be met an eight-day safe conduct to return home."

ment de commerce, au droit de prise; une sorte de convention tacite entre toutes les nations européennes les en affranchit, et plusieurs déclarations officielles ont confirmé ce privilège en faveur 'd'une classe d'hommes dont le travail pénible et peu lucratif, ordinairement exercé par des mains faible et agées, est si etranger aux opérations de la guerre.'

" C'est cette doctrine que professa le comité de salut public de la république francaise lorsqu'il renvoya, sans échange, les pêcheurs anglais qui se trouvaient en France, au mois de thermidor an III (juillet 1796), ne les considérant pas comme prisonniers de guerre.

" Déjà, vers le milieu du 17e siècle, la neutralité parfaite de la pêche était admise au nombre des principes du droit maritime des nations; aussi Louis XIV, tout en éloignant des côtes de France les pêcheurs anglais qu'il soupçonnait de se livrer à l'espionage, accorda-t-il, par son ordonnance du 1er octobre 1692, aux pêcheurs qui seraient rencontrés, un sauf-conduit de huit jours pour retourner chez eux."

*Pistoye et Duverdy, Des Prises Maritimes** (about 1860), vol. 1, p. 314, say:

" Les navires ennemis, avons nous dit, sont de bonne prise; pas tous, cependant: car il resulte de l'accord unanime des puissances maritimes qu'une exception doit être faite en faveur de pêcheurs côtiers. Ces pêcheurs sont respectés par l'ennemi, tant qu'ils se livrant uniquement à la pêche."

Ortolan, Diplomatie de la Mer, (1864,) II, p. 51, says:†

" Toutefois, la coutume admet une exception en faveur des bateaux qui se livrent à la pêche côtière; ces bateaux ainsi que leurs équipages sont à l'abri de la capture et exempts de toute hostilité.

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* Pistoye and Duverdy—Maritime Prizes, vol. 2, p. 314:

" Enemy vessels, as has been said, are good prize. Not all, however; for it is established by the unanimous accord of the maritime powers that an exception must be made in favor of coast fishermen. Such fishermen are respected by the enemy so long as they devote themselves exclusively to fishing."

†Ortolan, Diplomacy of the Sea, II, p. 51:

" Nevertheless, the custom admits an exception in favor of the boats engaged in coast fisheries: These boats, as well as their crews are free from capture and exempt from all hostilities.

" The coast-fishing industry is, in effect, entirely pacific and of much less importance than maritime commerce or the great fisheries in regard to

"L'industrie de la pêche côtière est, en effet entièrement pacifique et d'une importance, quant à la richesse nationale qu'elle peut produire, bien moins grande que celle du commerce maritime ou des grandes pêches. Paisibles et tout à fait inoffensifs, ceux qui l'exercent, parmi lesquels on voit souvent des femmes, peuvent être appelés les moissonneurs des mers territoriales, puis qu'ils se bornent à en récolter les produits; ce sont, pour la plupart, des familles pauvres qui ne cherchent guère dans ce métier que le moyen de gagner leur vie.

"Depuis des temps reculés la France a donné l'exemple de la mise en pratiques de l'adoucissement fait en leur faveur aux maux de la guerre. * * *

"Dès le commencement de la guerre de l'indépendance americaine, Louis XVI. voulant donner l'exemple à ses ennemis, ordonna de ne point inquiéter les pêcheurs anglais, et de ne point arrêter leurs bâtiments, non plus que ceux qui seraient chargés de poisson frais, quand même ce poisson n'aurait pas été pêché à bord de ces bâtiments, 'pourvu toutefois,' disait S. M. dans une lettre à l'admiral qu'ils ne soient armés d'aucunes armes défensives, et qu'ils ne soient pas convaincus d'avoir donné quelques signaux qui annonceraient une intelligence suspecte avec les bâtiments de guerre ennemis.

"Il parait que les Anglais usèrent de réciprocité pendant tout le cours de cette guerre. Mais dans celle de la révolu-

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the national wealth which it can produce. Those engaged in it, peaceful and entirely inoffensive, and among whom women are often seen, may be called the harvesters of territorial waters, as they confine themselves to gathering in the products thereof; they are for the greatest part, poor families who seek in this trade only the means of gaining a livelihood.

"Since early times France has given the example of putting in practice the softening of the evils of war made in their favor. * * *

"From the beginning of the war of American independence Louis XVI wishing to give the example to his enemies gave orders not to molest the English fishermen and not to arrest their boats, nor those with cargoes of fresh fish, even if such fish had not been caught from these boats 'provided always' said His Majesty in a letter to the admiral 'that they are not armed with any weapon of defense and that they are not proved to have given any signals which might indicate suspicious relations with the enemies' vessels of war.'

"'It appears that the English reciprocated throughout the whole course of this war. But in that of the French revolution they often departed

tion française, ils s'écarterènt souvent de cette pratique si conforme aux sentiments d'humanité; et ce ne fut pas par des actes isolés dont la responsabilité serait tombée seulement sur les capitaines anglais qui en étaient les auteurs, mais bien d'après les ordres exprès du gouvernement britannique, notamment d'après l'ordre du 24 janvier 1798, qui enjoignait aux commandants des vaisseaux anglais de faire saisir les pêcheurs française et hollandais, et leurs bateaux.

" Néanmoins, le gouvernement française, ne voulant pas user de représailles, renouvela au mois de mars 1800 les ordres donnés en 1779 par Louis XVI. Ces ordres ayant été communiqués au *Transport Office* de Londres, par M. Otto qui résidait en cette ville en qualité de commissaire pour l'échange des prisonnieres de guerre, le gouvernement anglais révoqua, le 30 mai, ses ordres du 24 janvier 1798. Mais peu après, sous divers prétextes qui donnèrent lieu à des plaintes de sa part, il remit en vigueur ces mêmes ordres.

" Le premier consul enjoignit alors à M. Otto de déclarer que 'si, d'une part, cet acte du gouvernement britannique, contraire à tous les usages des nations civilisées et au droit commun qui les régit, même en temps de guerre, donnait à la guerre actuelle un caractère d'acharnement et de fureur qui détruisait jusqu'aux rapports d'usage dans une guerre loyale; de l'autre, il était impossible de ne pas reconnaitre que cette conduite du gouvernement anglais ne tendait qu'à exaspérer davantage les deux nations, et à éloigner encore le terme de la paix; qu' en conséquence, lui, M. Otto, ne

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from this practice, so conformable to sentiments of humanity; and it was not by isolated acts, the responsibility for which would have fallen alone on the English captains who were the authors thereof, but by express orders of the British government, notably by the order of January 24, 1798, which instructed the commanders of English vessels to seize French and Dutch fishermen and their boats.

" Nevertheless, the French government, not wishing to make reprisals, renewed in the month of March, 1800, the orders given by Louis XVI in 1779. These orders having been communicated to the Transport office of London by M. Otto, who resided in that city as commissioner for the exchange of prisoners of war, the English government revoked on May 30 its orders of January 24, 1798. But soon after, under various pretexts which occasioned complaints on its part, it put these same orders into effect again.

" The first consul then instructed M. Otto to declare that 'though this

pouvait plus rester dans un pays où non-seulement on avait abjuré toute disposition à la paix, mais où les lois et les usages de la guerre étaient méconnus et violés.'

"M. Otto déclara en même temps que le gouvernement français s'abstiendrait de toutes représailles afin de ne pas rendre, pour sa part, de misérables pêcheurs victimes de la prolongation des hostilités."

Ortolan, II, pp. 448, 449,* quotes the orders given to the French navy March 31, 1854, on the outbreak of the Crimean war:

"Instructions addressées par Son Excellence le ministre secrétaire d'État au département de la marine et des colonies à MM. les officiers généraux, supérieurs et autres, commandant les escadres et les bâtiments de Sa Majesté Impériale. * * *

"§ 2. Vous n'apporterez aucun obstacle à la pêche côtière, même sur les côtes de l'ennemi; mais vous veillerez à ce que cette faveur, dictée par un intérêt d'humanité, n'entraine aucun abus préjudiciable aux opérations militaires et

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act of the British government, contrary to all the usages of civilized nations and to the common law which controls them, even in time of war, gave to the present war a character of rage and fury which destroyed even the usual intercourse of a loyal war; yet it was impossible not to recognize that this conduct of the English government tended only further to exasperate the two nations and to postpone the time of peace; that consequently, he, M. Otto, could no longer remain in a country where not only all desire of peace was abjured but also the laws and usages of war were disregarded and violated.'

"M. Otto stated at the same time that the French government would abstain from all reprisals so as not to make, for its part, miserable fishermen the victims of the prolongation of hostilities."

* "Instructions given (in 1854) by His Excellency the Minister Secretary of State for the Department of the Navy and the Colonies to the general officers, superior and other, commanding the squadrons and vessels of His Imperial Majesty.

"§ 2. You will not interfere in any way with the coast fisheries even on the enemy's shores; but you will see that this favor, dictated by interests of humanity, does not give rise to any abuse which may prejudice military and maritime operations. If you are in service in the waters of

maritimes. Si vous êtes employés dans les eaux de la mer Blanche, vous laisserez aussi subsister sans interruption, et sauf répression en cas d'abus, l'échange de poisson frais, de vivres, d'ustensiles et d'agrès de pêche qui se fait habituellement entre les paysans des côtes russes de la province d'Archangel et les pêcheurs des côtes du Finnmarken norvégien."

Snow, Cases on International Law, pp. 565, 566, quotes the orders given to the French navy in the Franco-Prussian war: *

"Instructions addressées par S. Exc. l'amiral ministre secretaire d'État, àu département de la marine et des colonies. A MM. les officiers généraux, supérieurs et autres commandant les escadres et les bâtiments de sa majesté impériale.

"Paris, le 25 juillet, 1870.

"§ 2. PÊCHERIES.—Vous n'apporterez aucun obstacle à la pêche côtière, même sur les côtes de l'ennemi; mais vous veillerez à ce que cette faveur, dictée par une intèrêt d'humanité, n'entraîne aucun abus préjudiciable aux opérations militaires ou maritimes."

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the White sea you will also allow to go on without interruption and subject to repression in case of abuse, the exchange of fresh fish, of provisions, of utensils, and of tackle, which is habitually made between the peasants of the Russian shores of the province of Archangel and the fishermen of the shores of Norwegian Finnmark.

* "Instructions given by His Excellency the Minister Secretary of State for the Department of the Navy and the Colonies to the general officers, superior and other, commanding the squadrons and vessels of His Imperial Majesty.

"Paris, July 25, 1870.

"§ 2. FISHERIES.—You will not interfere in any way with the coast fisheries, even on the enemy's shores; but you will see that this favor, dictated by interests of humanity, does not give rise to any abuse which may prejudice military or maritime operations."

Calvo, 4 *Droit International* (5th ed. 1896), pp. 325–327,* fully states the rule, with its limitations, as he considers it established and acknowledged today:

"§ 2367. Malgré les rigueurs que les guerres maritimes font péser sur la propriété privée, malgré l'étendue des droits reconnus aux belligérants, on exempte généralement de saisie ou de confiscation les bâteaux pêcheurs, les navires affectés a des missions scientifiques, et ceux qui, par suite de naufrage ou dans l'ignorance de l'état de guerre, relâchent, sur les côtes ou dans les ports ennemis.

"§ 2368. La France, dans la plupart de ses guerres sur mer, a exempté de capture les barques et les bâteaux employés exclusivement à la pêche. Cette exception est parfaitement justiciable: 'L'industrie de la pêche côtière, dit Ortolan, est entièrement pacifique et d'une importance, quant à la richesse nationale qu'elle peut produire, bien moins grande que celle du commerce maritime ou des grandes pêches. Paisibles et tout à fait inoffensifs, ceux qui l'exercent, parmi lesquels on voit souvent des femmes, peuvent être appelés moissonneurs des mers territoriales, puisqu'ils se bornent à en récolter les produits; ce sont, pour la plupart des familles pauvres, qui ne cherchent guère dans

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*4. Calvo International Law, sec. 2367.

"Notwithstanding the hardships that maritime wars impose on private property, notwithstanding the extent of the recognized rights of belligerents, fishing boats and vessels engaged in scientific missions and those which by reason of shipwreck or ignorance of a state of war, touch the shores or put into the ports of an enemy are generally exempted from seizure or confiscation.

"§ 2368. France in the greater part of its maritime wars has exempted from capture the vessels and boats exclusively employed in fishing. This exception is perfectly proper. 'The coast fishing industry (says Ortolan) is entirely pacific and of an importance very much less than that of maritime commerce or of the great fisheries in relation to the national wealth that it can produce. Peaceable and entirely inoffensive, those who engage in it, among whom women are often seen, can be called the harvesters of territorial waters as they confine themseves to gathering its products. They are, for the greater part, poor families who only seek in this trade the means of earning a livelihood.' (Ortolan, 4th edition, II, Book 3, chapter 2, p. 51.)

"Sec. 2369. The royal edicts of 1543 and 1584 and article 80 of the

ce métier que le moyen de gagner leur vie' (Ortolan, 4e édit, II, liv. III, ch. 11, p. 51).

"§ 2369. Les édits royaux de 1543 et de 1584, et l'article 80 de la Juridiction de la marine imposaient à cet égard une abstention absolue aux commandants de croiseurs et de corsaires. Si l'ordonnance de 1681 ne rappela pas cette défense et si l'ordonnance de 1692 fit disparaître l'exception au profit des bâteaux de pêche en les déclarant confiscables, cela tient, comme on sait, à la conduite violente des officers de la marine britannique, qui, au mépris des stipulations des traités, saisissaient et détruisaient les barques des pêcheurs français. Pendant la guerre de l'indépendence des États-Unis, le gouvernement de Louis XVI remit en vigueur les anciens édits, et ordonna de ne point molester les pêcheurs anglais, ni en général les navires chargés de poissons frais à moins cependant qu'ils n'eussent des armes à leur bord, ou qu'on ne pût les soupçonner d'entretenir des intelligences avec des navires de guerre ennemis.

"§ 2370. Les annales du Conseil des prises de Paris ne nous ont fourni qu'un exemple saillant de l'application à un particulier des principes de législation que nous venons de rappeler: c'est celui de la barque de pêche portugaise *Nossa Senhora da Piedade*, capturée par le corsaire *la Carmagnole*. Le capitaine demanda sa relaxation, en alléguant qu'il était sorti du port de Peniche pour se livrer à la pêche du maquereau avec salaison à bord; que lui et les treize hommes de son équipage avaient employé à cette opération tout le

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Juridiction de la Marine imposed in this regard an absolute prohibition on the commanders of cruisers and privateers. If the ordinance of 1681 did not renew this prohibition and if the ordinance of 1692 caused the exception in favor of fishing boats to disappear by declaring them subject to confiscation, that as is known arose because of the violent conduct of the officers of the British navy who in defiance of the stipulation of treaties seized and destroyed the boats of French fishermen. During the War of Independence of the United States of America, the government of Louis XVI again put in force the ancient edicts and gave orders not to molest the English fishermen nor in general vessels laden with fresh fish unless they had arms on board or unless they were suspected of keeping up communications with vessels of war of the enemy.

"§ 2370. The annals of the Conseil des Prises of Paris have furnished us with but one striking example of the application in a particular case of the principles of legislation to which we have called attention. It is that of the Portuguese fishing vessel *Nossa Senhora Da Piedade* captured

temps qui s'était écoulé entre son départ et sa capture ; enfin qu'il avait été saisi à trois ou quatre lieues en pleine mer, à la hauteur de Tavira. Tous ces faits ayant été reconnus exacts, le commissaire du gouvernement requit la nullité de la capture, conformément aux précédents de la législation française et aux usages des nations civilisées. Le Conseil des prises, dans les considérants de sa decision, rappela *les principes d'humanité et les maximes du droit des gens*, et finalement invalida la prise de *la Nossa Senhora da Piedade*.

"§ 2371. Au commencement des guerres de la Révolution française, l'Angleterre ne suivit pas l'exemple donné par la France, et fit saisir et confisquer un grand nombre de bateaux pêcheurs français ou hollandais, dont les équipages furent traités comme prisonniers de guerre. Pourtant en 1799, après l'échange de plusieurs notes diplomatiques, la Grande-Bretagne révoqua son ordonnance de 1798, mais en déclarant que pour elle la liberté de la pêche n'était qu'un acte de pure tolérance, qui ne pourrait s'appliquer ni à la grande pêche ni au commerce des huîtres.

"§ 2372. Dans le cours de leur guerre contre le Mexique, les États-Unis permirent aux pêcheurs ennemis de continuer librement l'exercice de leur industrie. La France agit de même lors des guerres d'Orient, d'Italie et d'Allemagne, en interdisant à tous ses croiseurs, par mesure générale, de troubler en rien la pêche côtière, et de saisir aucune barque

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by the privateer *Carmagnole*. The captain demanded his release alleging that he had left the port of Peniche with pickle aboard to fish for mackerel. That he and the thirteen men of his crew had thus employed all the time which had elapsed between his departure and his capture and finally that he had been seized three or four leagues out on the open sea opposite Tavira. All these facts having been shown to be exact, the government commissioner advised the capture was null conformably to the precedents of French legislation and to the usages of civilized nations. The Conseil des Prises in the reasoning of its decision referred to the principles of humanity and the maxims of international law and finally declared the capture of the *Nossa Senhora Da Piedade* invalid.

"§ 2371. At the beginning of the wars of the French revolution England did not follow the example set by France and seized and confiscated a large number of French and Dutch fishing boats, whose crews were treated as prisoners of war. But in 1799 after the exchange of several diplomatic notes, Great Britain revoke l its ordinance of 1798 but declared

ou aucun bateau, à moins de nécessités commandées par les opérations militaires et maritimes. * * *

"§ 2373. Le privilége d'exemption de capture, qui est généralement acquis aux bateaux pêcheurs exploitant leur industrie à proximité des côtes, n'est dans aucun pays étendu aux navires qui se livrent en haute mer à ce qu'on appelle la grande pêche, telle que celle de la morue, du cachalot, de la baleine, du phoque et du veau marin. Ces navires sont en effet considérés comme adonnés à des opérations à la fois commerciales et industrielles."

The most recent practice or enactment on the subject is reported in *Takahashi's International Law During the Chino-Japanese War*. He quotes in full the prize law promulgated by the Emperor of Japan at the beginning of the war with China, of which chapter I, article 3 (p. 178), provides:

"The following enemy's vessels are exempt from detention:

"(1.) Boats engaged in coast fisheries."

The foregoing review of authorities clearly shows that both by law and by uniform practice coast fishing boats are exempt from capture so long as they devote themselves exclusively to fishing. Taking any part in belligerent operations or conveying information deprives them of exemption;

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that for it the freedom of the fisheries was an act of pure toleration, which could not be applied to the great fisheries nor to the oyster trade.

"§ 2372. In the course of their war against Mexico, the United States allowed the enemy fishermen to continue freely the exercise of their industry. France acted in the same way at the time of the Crimean war, the Italian war, and the German war in forbidding all its cruisers by a general order to disturb in any way the coast fisheries or to seize any vessels or boats unless made necessary by reason of military and maritime operations.

"§ 2373. The privilege of exemption from capture which is generally given to fishing boats plying their industry in the proximity of shore is in no country extended to vessels which are engaged on the high seas in what is called the great fisheries—such as that for the cod, the cachalot, the whale, the seal and the seal calf. These vessels are in effect considered as engaged in both commercial and industrial operations."

but the statement of this qualification serves only to emphasize the rule itself.

It does not appear that the size or class of the boat affects the application of the rule, nor that the coast on which fishing is done may not be that of the country to which the fishermen belong. It is the character of the work and of those engaged in it that gives rise to the right. "Coast fisheries" are referred to not as related to distances greater or less from the coast to the fishing grounds, but to distinguish the class of men and boats from those which fish in the far-off seas for whale, cachalot, cod, seal, and seal calf (4 *Calvo*, 5th ed., § 2373, p. 327).

It seems that the United States has hitherto followed the general rule, and the orders to acting Rear Admiral Sampson in the last war appear to recognize the rule in a message stating its limitation.

During the Mexican war fishing boats were granted immunity. Though the orders, if explicit orders were given, do not appear to be of public record, the fact is stated in all modern text books (*Lawrence*, p. 383; 4 *Calvo*, § 2372; Halleck, Baker's ed., vol. II, p. 106).

Snow, Naval War College Lectures (p. 97), states the present rule as follows:

"The question is brought up occasionally as to whether the boats and men employed in the coast fisheries of a belligerent State are free from capture and interference by an enemy. It has not been the rule to capture such boats and fishermen, though no exemption has been claimed for deep-sea fisheries, except by the inhabitants of Nantucket during our war of 1812."

In the war with Spain, and on April 30, after the captures in these cases, the Secretary of the Navy instructed the commander-in-chief of the North Atlantic squadron, in answer to an inquiry, as follows:

"WASHINGTON, *April* 30, 1898.

"SAMPSON, *Key West, Fla.:*

"Spanish fishing vessels *attempting to violate blockade* are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained.

"LONG."

(*Appendix to Report of Bureau of Navigation*, 1898, p. 178.)

It is believed that orders had previously been given not to capture fishing boats; but if given they have not been made public. That such orders were in existence, however, is to be inferred from the fact that the *Cincinnati* omitted to seize the *Lola*, and merely warned her of the blockade and allowed her to proceed to Bahia Honda, where she was captured by the *Dolphin* (Rec., Ans. to 29th Int.).

But whatever the private orders may have been as to fishing boats engaged or which were suspected to be about to engage in the enemy's service, they have no just application to the present cases. The facts show that these boats had been out fishing before war began and were returning, when captured, in complete ignorance of any hostilities. There was nobody on board whom the most suspicious officer could imagine would be of material assistance to the enemy even if possessed of anti-Cuban predispositions, which in the case of Cubans is not to be presumed. There is nothing in the records to suggest that the boats or their crews were in any respect different from those as to which a well-defined practice exists, and the President having especially invoked such practice for the guidance of all persons, including the courts, the vessels should receive the immunity it affords.

POINT SECOND.

AT THE TIME OF THEIR CAPTURE THE FISHING BOATS, AS THE PROPERTY OF CUBANS, WERE ENTITLED TO THE RIGHTS AND PRIVILEGES OF VESSELS BELONGING TO NEUTRALS OR ALLIES. THE PEOPLE OF CUBA HAD BEEN RECOGNIZED BY THE UNITED STATES AS FREE AND INDEPENDENT, AND HENCE THEIR PROPERTY COULD NO LONGER BE CONSIDERED AS HOSTILE.

(a.) The joint resolution of Congress approved April 20, 1898 (*post*, p. 61), declared "that the people of the island of Cuba *are*, and of right ought to be, *free and independent*." called upon the Spanish government to relinquish its authority and government in the island, and to withdraw its land and naval forces therefrom, and directed and empowered the President to use the land and naval forces of the United States, and to call into service the militia of the several States to such extent as might be necessary to carry the resolution into effect.

The three years' struggle in Cuba, referred to in the preamble of the resolution, is matter of common knowledge. On one side was ranged the power of Spain, represented by her army and naval forces, occupying most of the important centers of the island, including the capital, Havana; on the other, scattered corps of armed insurgents, occupying practically all the rural districts, supported and maintained by the sympathy and help of the overwhelming majority of the inhabitants, and particularly by the native-born Cubans. The attempt to throw off the yoke of Spain was watched with the keenest interest by the American people, and the joint resolution of Congress was but the culmination and expression of the public sentiment of this country.

The reference to the Cuban insurrection is made for the

purpose of arriving at an understanding of what was meant by the joint resolution. In the light of preceding events and actual public opinion, it clearly indicated that Congress sought to differentiate between the Spanish domination, and what stood for it, and the people of Cuba who were subjected to it and struggling against it. The former was to be done away with by force, if necessary; the latter were to be freed from their bondage. The two classes of inhabitants of Cuba—the Spanish army and navy on one side, and the Cuban people on the other,—were acknowledged to be and were placed in opposition to each other. One might become, and in the contingency actually did become, hostile to us; the other was protected and aided by us, and became our allies.

It cannot be conceived that those whom it was our policy and intention to protect and aid should suffer either in their persons or their property by reason of our warfare against the very ones from whose domination we sought to deliver them; that hostility against their oppressors should be made the excuse for further despoiling them.

So far as concerns our dealings with foreign powers, the recognition of a state of war, belligerency, or independence, the courts have no initiative or original power, but are controlled entirely by the position assumed by the legislative and executive branches of the Government.

It therefore becomes of importance to determine in what recognition consists, and when and how it may be expressed; for after the other branches of the Government have acted it is competent for the court, in determining questions of private right, to consider the quality or effect of the acts.

The text-writers and cases show that the status of a people or of some part of a people, in courts concerned with the application of the principles of international law, may be acquired in different ways.

"Recognition may be effected in various ways. The most formal mode is by express declaration, issued separately

and addressed to the new State, or by a declaration included in a convention made with it. * * * But any act is sufficient which clearly indicates intention" (*Hall, Int. Law*, part II, ch. 1, sec. 26).

"Referring to the term recognition, Mr. Canning stated in 1823 that 'the law of nations was entirely silent on this point,' but he attached this meaning to it: 'If the colonies say to the mother country, "We assert our independence" and the mother country answers "I admit it," that is recognition in one sense. If the colonies say to another State "We are independent," and that other State replies "I allow that you are so," that is recognition in another sense of the term. That other State simply acknowledges the fact or rather its opinion of the fact.'" * * * (*Baker's Halleck, Int. Law.*, vol. I, ch. 3, p. 85.)

"The act intended to recognize the independence of a colony or of a province is exclusively within the attributes of the executive power of each State," says *Calvo* (5th ed., sec. 93).

In *Gelston vs. Hoyt*, 3 Wheat., 322, the question arose out of a seizure made for an alleged violation of our neutrality laws in sending out a filibustering expedition to help the contestants in the Haytian civil war. Mr. Justice Story, in his opinion said:

"No doctrine is better established than that it belongs exclusively to governments to recognize new States in the revolutions which may occur in the world; and until such recognition either by our own government or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was especially held by this court in the case of *Rose vs. Himely*, 4 Cranch, 24, and to that decision we adhere."

No evidence of any governmental declaration concerning either contestant having been produced, the seizure was declared void.

In *U. S. vs. Palmer* (3 Wheat., 610) the question arose out of the prosecution as pirates of Palmer and others who attacked and plundered Spanish ships under a commission issued by the revolted South American colonies. The Supreme Court was called upon to decide:

"Whether any revolted colony, district or people, which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States as a sovereign or independent nation or power, have authority to issue commissions to make capture on the high seas of the persons, property and vessels of the subjects of the mother country; who retain their allegiance; and whether the forcible seizure with violence, and by putting in fear of the persons on board of the vessels, the property of the subjects of such mother country, who retain their allegiance on the high seas, in virtue of such commissions, is not to be deemed a robbery or piracy, within the provisions of the act of Congress."

Chief Justice Marshall (p. 634) said:

"Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. * * * The court will only observe that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new State absolutely—or may make a limited recognition of it. *The proceedings in courts must depend so entirely on the course of the Government* that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally,

that if the government remains neutral and recognizes the existence of a civil war its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful and would be to array the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department."

The Government having remained neutral in the conflict, the indictment was dismissed, rights of belligerency having been acquired.

In the *Divina Pastora* (4 Wheat., 52) the Spanish consul was the claimant of a vessel captured by privateers of La Plata. Chief Justice Marshall delivered the opinion of the court, saying (at p. 63):

"The decision at the last term in the case of the *United States vs. Palmer* establishes the principle that the Government of the United States, having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which new governments in South America may direct against their enemy. Unless the neutral rights of the United States, as ascertained by the law of nations, the acts of Congress and treaties with foreign powers are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country. If therefore it appeared in this case that the capture was made under a regular commission from the government established at Buenos Ayres, by a vessel which had not committed any violation of our neutrality, the captured property must be restored to the possession of the captors. But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners."

Williams vs. Suffolk Insurance Co. (13 Peters, 415) was an action on a policy of insurance, and the following question was certified to the Supreme Court:

"Whether inasmuch as the American Government has insisted and still does insist through its regular executive authority that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres and that the sea fisheries at those islands is a trade free and lawful to the citizens of the United States and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish, it is competent for the circuit court in this case to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of the said Falkland islands, and if such evidence authorizes the courts to decide against the doctrines and claims set up and supported by the American Government on this subject, or whether the action of the American Government on this subject is binding and conclusive on this court as to whom the sovereignty of those islands belongs."

The court held that the action of the executive department on the question to whom the sovereignty of those islands belonged was binding and conclusive upon the courts of the United States, Mr. Justice McLean, who delivered the opinion of the court, saying (p. 420):

"And can there be any doubt that when the executive branch of the Government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire nor is it the province of the court to determine whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and Government of the Union.

"If this were not the rule, cases might often arise in which on the most important questions of foreign jurisdic-

tion there would be an irreconcilable difference between the executive and judicial department. By one of these departments, a foreign island or country might be considered as at peace with the United States whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise and so destructive to national character.

"In the case of *Foster vs. Neilson* (2 Peters, 253) and *Garcia vs. Lee* (12 Peters, 511) this court have laid down the rule that the action of the political branches of the Government in a matter that belongs to them is conclusive.

"And we think in the present case, as the Executive in his message and in his correspondence with the government of Buenos Ayres has denied the jurisdiction which it has assumed to exercise over the Falkland islands, the fact must be taken and acted upon by this court as thus asserted and maintained."

In *Jones vs. The United States* (137 U. S., 202) the question turned on the jurisdiction of the United States over the island of Navassa. Mr. Justice Gray, who delivered the opinion of the court, used the following language (p. 212):

"Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances (*Gelston vs. Hoyt*, 3 Wheaton, 246; *United States vs. Palmer, idem*, 610; *The Divina Pastora*, 4 Wheaton, 52; *Foster vs. Neilson*, 2 Peters, 253; *Keene vs. McDonald*, 8 Peters, 308; *Garcia vs. Lee*, 12 Peters, 511; *Williams vs. Suffolk Ins. Co.*, 13 Peters, 415; *United States vs. Yorba*, 1 Wallace, 412; *United States vs. Lynd*, 11 Wallace, 632).

"It is equally well settled in England (*The Pelican*, Edwards' Admiralty Appendix; *Taylor vs. Barkley*, 2 Sim., 213; *Emperor of Austria vs. Day*, 3 De G. F. & J., 217; *Republic of Peru vs. Peruvian Guano Co.*, Law Rep., 36 Chancery Div., 489; *Republic of Peru vs. Dreyfus*, Law Rep., 38 Chancery Div., 348).

* * * "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer or of its recognition or denial of the sovereignty of a foreign power as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings (*United States vs. Reynes*, 9 Howard, 127; *Kennett vs. Chambers*, 14 Howard, 38; *White vs. Russell*, 117 U. S., 401; *Coffee vs. Groover*, 123 U. S., 1; *State vs. Dunwell*, 3 Rhode Is., 127; *State vs. Wagner*, 61 Maine, 178; *Taylor vs. Barkley* and *Emperor of Austria vs. Day*, above cited; 1 *Greenleaf's Evidence*, sec. 6)."

In the *Santissima Trinidad* (7 Wheat., 283) Mr. Justice Story said (p. 337):

"There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not yet been acknowledged by the executive or legislature of the United States, and, therefore, is not entitled to have her ships of war recognized by our courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties and to allow to each the same rights of asylum and hospitality and intercourse. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war and entitled to be respected in the exercise of those rights. We cannot interfere, to the prejudice of either belligerent, without making ourselves a party to the contest and de parting from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports under the laws of nations must be considered as equally the right of each, and as such must be recognized by our courts of justice until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this court, and we see no reason to depart from it."

The recognition of an insurgent body as belligerent, in the technical sense of the phrase, makes that insurgent body a state for all purposes of the war (*Lawrence*, secs. 162, 163; *Dana's Wheaton*, sec. 23, note; *Hall's International Law*, 4th ed., 32, 35–'7, and cases *supra*).

A fortiori, the recognition of the freedom and independence of a whole people must of necessity regard them as a State for all purposes of war, and the use of the expression "the people of Cuba" in the joint resolution of Congress must certainly have that effect.

In *Nesbitt vs. Lushington* (4 Term R., 783), a ship approaching the Irish coast was set upon by an Irish force for the purpose of seizing the ship and holding her until the captain should agree to sell them, at a stipulated price, the corn with which she was loaded. This they proceeded to do. The question arose whether the act was a restraint or detention by a "people" within the sense of those words as used in a policy of marine insurance. The court held that the word "people" did not apply to individuals, but to a Government—to nations in their collective capacity.

To the same effect, *The Itata*, 56 F. R., 505; *Morau vs. Ins. Co.*, 6 Wall., 1; *Marshall on Insurance*, bk. 1, ch. 12, sec. 5; 3 *Kent's Comm.*, 302, note *d*, 6th ed.

In the *United States vs. Quincey* (6 Peters, 445), Mr. Justice Thompson used this language (p. 467):

"The indictment charges that the defendant was concerned in fitting out the *Bolivar*, with intent that she should be employed in the service of a foreign people; that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the Executive Department of the Government of the United States, before the year 1827. And therefore it is argued that the word 'people' is not properly applicable to that nation or power.

"The objection is one purely technical and, we think, not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed, and it is one of the denominations applied by the act of Congress to a foreign power."

In the *Three Friends* (166 U. S., 1, 56) Mr. Chief Justice Fuller, speaking for the court, said:

"Of course, a political community *whose independence has been recognized* is a State under the act" (R. S., sec. 5, 283); "and if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized is also embraced by that term, then the words 'colony,' 'district,' or 'people,' instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise, and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded; and as agreeable to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent State, concedes to the government recognized the rights, and imposes upon it the obligations, of an independent State in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a government are not in aid of the State, in the sense of the statute."

And further (p. 63):

"But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."

Similar in effect are *The Hornet*, 12 Fed. Cas., 527; *U. S. vs. 129 Packages*, 27 Fed. Cas., 284; *Clark vs. U. S.*, 3 Wash. C. C., 101; *The James J. Swan*, 50 F. R., 108; *Underhill vs. Hernandez*, 168 U. S., 250; *The Conserva*, 38 F. R., 437.

Whether certain admitted acts or communications of the executive department do or do not amount, in legal effect, to the recognition of belligerency or of independence in a particular case is a matter for the court.

The exact point was before Judge Brown, of the New York district, in the case of the *Ambrose Light* (25 Fed. Rep., 408). That vessel was seized in the Caribbean sea by our naval forces and pursuant to our naval regulations for not having a proper commission on board, and was brought to New York and libeled by the Government as prize on the ground that under the law of nations she was a pirate.

Up to the day of the seizure the Colombian rebels, to whom she belonged, had not obtained recognition of their belligerency. The Colombian government had previously directed the attention of the United States to certain of its decrees, one of which proclaimed certain rebel ports closed to foreign commerce, and another of which declared, in substance, that rebel vessels then operating against Cartagena were irregular and unlawful, were flying the Colombian flag without authority, and might be repressed by the vessels of any other nation charged with watching its commercial interests as being beyond the pale of international law.

On the day the *Ambrose Light* was seized, Mr. Bayard, then Secretary of State, replied to these communications, declining to acquiesce in either of the decrees, and in the course of his dispatch used the following language:

"A decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extraterritorial effect in the direction imposing any obligation upon the governments of neutral powers to recognize it." * * * "Vessels manned by parties in arms against the government when passing to and from ports held by such insurgents, or even when attacking ports in possession of the Colombian government, are not pirates by the law of nations, and cannot be regarded as pirates by the United States."

It was contended by the claimants that these passages in Secretary Bayard's dispatch impliedly recognized the Colombian rebels as possessing belligerent rights, and that accordingly the vessel should be considered as the property of belligerents and restored. Judge Brown found that, but for this letter, the *Ambrose Light* would have occupied the position of a pirate, and would have been subject to condemnation; but he adopted the claimants' view that Secretary Bayard's letter impliedly recognized the Colombian rebels as possessing belligerent rights. That conclusion gave a legal status to the vessel as of the day of her capture, and a decree of restoration followed.

In dealing with that branch of the matter Judge Brown in his opinion (p. 44) said:

"The attitude assumed by our Government in these conclusions is of itself, by necessary implication, a recognition of the existing insurrection as constituting a state of civil war. It assumes that the Colombian government, as respects the ports in question, is a *belligerent;* that the insurgents hold those ports as a *de facto* power, to the exclusion, for the time being, of the Colombian government and of its sovereign authority; that they are in arms against the latter government; and it is declared that our Government will not recognize any attempt by the Colombian government to close these ports by virtue of its own sovereignty as lawful or valid; nor any closure, except by means of an effectual blockade, *i. e.*, by acts of war. In saying that it would recognize no rights of the Colombian government at those ports, except *belligerent* rights, our Government implies belligerent rights in those who hold those ports adversely."

Under these decisions there can be no doubt that had the Cubans possessed vessels flying a Cuban maritime flag and operating against Spanish vessels, we should have been bound to regard captures made by them as valid, in view of their recognition as independent. The direct and logical conclusion necessarily follows that we could not capture their vessels as hostile when our only enemy was Spain (*Talbot vs. Janson*, 3 Dall., 133; *Beawes, Lex Mercatoria*, 252).

(b.) Is there any doubt upon the proofs that the owners of these boats were "Cubans" in the sense of the resolution of recognition?

The owner of the *Paquete Habana* is Justa Galban, a widow (pp. 13, 14, 10). In answer to the standing interrogatories the master says, "She lives in Havana, and is a Spaniard by birth" (Ans. to 9th Int., p. 10). Presumably by this he meant only that she was born under Spanish rule, as in the test affidavit he states she is "a native-born Cuban, domiciled in Cuba at the time of the recognition of the independence of the Cuban people by Congress" (p. 14). It also appears elsewhere that she had resided in Havana and had owned the boat for at least five years before the capture (Ans'rs to 6th, 7th, and 9th Ints.). It is nowhere intimated that she was in any manner connected with the Spanish military and naval forces, which constitute the only classes of people the Congress declared should be removed from Cuba (Resolution, § 2, *post*, p. 62). Justa Galban resided, was domiciled, and owned property in Cuba, and was, on the evidence, a Cuban in the sense of the resolution of recognition.

The owner of the *Lola* is Severo Gonzales. "The owner lives in Cuba" (Ans. to 4th Int., p. 9). "He was born in *the* Spain and now lives in Havana, Cuba. He has lived there for a long time. * * * He has owned the boat about ten years" (Ans. to 9th Int., p. 10). In the test affidavit the master gives the owner's name as Sibors Gonzales and describes him as "a native of Cuba, domiciled in Cuba at the time of the recognition of the independence of the Cuban people by the Congress" (p. 13). It appears fairly, from both parts of the captain's evidence, that Gonzales had resided and was domiciled in Havana for many years.

Whether he was actually born there or in Spain does not seem entirely clear, nor is it material. The rights of the people, as Cubans, and the immunity of their property from capture, as that of enemies, is determined by the test of

domicile (*Twiss, Int. Law in Time of War*, § 152; *The Danous*, 4 C. Rob., 256, *note*; *The Ann*, 1 Dods., 221). Under these authorities long residence and domicile suffice to make a man a "Cuban." (See *post*, p. 57.)

Captain Pasos, of the *Paquete Habana*, has resided in Havana 14 years (Ans. to 1st Int., p. 9), and the other two members of his crew were shipped from there (Ans. to 5th Int.). All were Cubans (Claim, p. 13).

Captain Betancourt, of the *Lola*, has resided in Havana 21 years (Ans. to 1st Int, p. 9). The five seamen he hired at different ports (Ans. to 5th Int., p. 9). This must, of course, mean Cuban ports, since the vessel had been under his command for four years (Ans. to 4th Int., p. 9). He refers to them as Spanish subjects, by which, however, he means, as stated in the claim, "Cubans, who prior to the recognition of Cuban independence were Spanish subjects" (p. 13).

From these facts it appears to be a fair conclusion that the two-thirds interest in the fish, which belonged to the crew, was owned by persons properly to be described as Cubans within the meaning of the resolution of recognition (cases *supra*).

POINT THIRD.

NO PRESUMPTION OF HOSTILE CHARACTER CAN ARISE IN THESE CASES FROM THE MERE PRESENCE OF THE SPANISH FLAG.

In determining the national character of a vessel the flag, as an outward or visible symbol thereof, is taken into consideration, but it is merely one of many circumstances. The actual ownership, the nature of the cargo, the circumstances of the capture, etc., everything which can throw light upon the subject, are examined (*Del Col vs. Arnold*, 3 Dall., 333; *S. C. below*, 1 Fed. Cas., 1178; *The Harrison*, 1 Wheat., 298; *Wheaton Int. Law*, § 445; *El Telegrafo*, 25 Fed.

Cas., 1008; *The Arcola*, 24 Fed. Cas., 849; *The General C. C. Pinckney*, Blatchford's Prize Cases, 668).

The owners of these boats resided in Havana, where the boats were enrolled, and were directly under the eye of the central Spanish power on the island. Their Cuban birth or domicile is proved, but it would have been folly for the small owners of fishing boats to take an active part in rebellion openly, or attempt to fly the Cuban insurrectionary emblem. This would have been only to court confiscation by the Spanish authorities. The vessels therefore remained enrolled as they had been, and continued fishing in the same way as before the revolution—that is, under the Spanish flag.

By the answers to the standing interrogatories and the affidavits of the various claimants it appears that no bills of lading or charter-parties existed. The documents of the vessels apparently consisted only of a muster-roll, custom-house papers, and the crew list. Practically nothing, therefore, can be learned from a study of the ships' papers found on board, except that their paucity and character confirm the fact that these were mere fishing boats.

The cargo found on board, live fish, was of the most innocent nature. It was taken from the waters off the Cuban coast (*P. H.*, pp. 11, 14; *Lola*, p. 10) and was owned by the owners of the boats and by the crew, all of whom were Cubans.

The captures were made without any resistance and, in fact, without knowledge on the part of the captured that war had broken out, or that Cuban independence was a recognized fact.

In short, the presence of the Spanish flag is the only circumstance tending to impress upon these boats a hostile character. Of itself, that is insufficient. *Wheaton*, § 445, says:

"The neutral flag constitutes no protection to an enemy's property, and the belligerant flag communicates no hostile character to neutral property."

No Cuban maritime flag then existed, nor has a Cuban flag actually been recognized by our Government up to the present. Cuban vessels now use the American flag. When these vessels sailed on their voyages long prior to April 20th, the only course open was to fly the Spanish flag. A Cuban flag, then, would have been the badge of piracy. Moreover, a display of Cuban colors on these boats at any time would have meant their immediate confiscation by the Spanish authorities. It was the part of policy and prudence, therefore, as well as that of necessity, to fly the Spanish colors at all times prior to April 20th. Whatever the real sentiments of the owners were in regard to the rebellion, its presence alone cannot change the true character of the vessels.

The interesting case of the *Palme* (*post*, pp. 63, 65) is directly in point here. That vessel was seized as prize during the Franco-Prussian war by a French cruiser while on a voyage from Accra to Bremen, where she was registered. She was flying the German flag and all indications pointed to her German nationality. Evidence was introduced, however, which showed that the *Palme* was a German-built vessel; that in 1866 she was sold to the *Société du Commerce des Missions Protestantes* of Basel, a Swiss corporation, and that she still belonged to the société at the time of her capture, though she carried the German flag. It also appeared that the Swiss federal council did not permit Swiss subjects to fly the Federal flag, and that France had, in 1854, refused to acknowledge any Swiss maritime flag. Thus the société being compelled to sail its ships under some flag, that of Germany or, rather, of Hanover, had been retained. In order to do this the ship was nominally assigned to an agent of the society at Bremen (*Wheaton*, 2*d English ed.*, *sec.* 340*a*). The lower court confirmed the seizure, but on appeal to the council of state the decree was reversed and the property restored. The decision is printed in the appendix (*post*, pp. 63, 65).

Similar results were reached in *Del Col vs. Arnold* (3 Dall., 333) and in *The Mary* (9 Cranch, 126).

POINT FOURTH.

EVEN IF THE SPANISH FLAG WAS PRIMA FACIE EVIDENCE THAT THE BOATS WERE ENEMY PROPERTY, IT WAS NOT CONCLUSIVE OF THE FACT. THE OWNERS AT THE DATE OF THE CAPTURES WERE NEUTRALS, AND WERE ENTITLED TO A REASONABLE TIME IN WHICH TO COMMUNICATE WITH THEIR VESSELS AND REMOVE THE SPANISH FLAG; AND CAPTURES BEFORE THE LAPSE OF SUCH TIME ARE INVALIDATED BY PROOF OF THE REAL NEUTRALITY OF THE PROPERTY.

This principle is well established and has been acted upon by the Supreme Court repeatedly with respect to neutrals whose domicile suddenly became that of an enemy by outbreak of war, and is applicable to ownership in vessel property.

The *William Bagaley* (5 Wall., 377) was captured July 18, 1863. She had been documented by the Confederate States by a register issued at Mobile, and was captured in striving to break the blockade of Savannah. She was owned, principally, by Cox, Brainard & Co., of Mobile, but one Joshua Bragdon, a loyal citizen of Indiana, claimed a one-sixth share in the vessel through his partnership in that firm. In denying the claim to restoration of this interest because of laches, the court (p. 408) said:

"The omission of the appellant to dispose of his interest in the steamer, and his failure to withdraw his effects from the rebellious State, are attempted to be explained and justified because the same were, as alleged in the petition, confiscated during the rebellion under the authority of the rebel government. *More than a year, however, elapsed* after the proclamation of the blockade was issued before any such pretended confiscation."

And further (p. 410):

"The principle of the decision is that whoever embarks his property in shares of a ship is in general bound by the character of the ship, whatever it may be, and that principle is as applicable to a citizen, *after due notice and reasonable opportunity to dispose of his shares*, as to a neutral" (p. 410).

Another similar case is that of a blockade-runner which was captured between Mobile and Havana in December, 1863. The owner of the vessel, who had built her in Alabama, claimed her, asserting that he was loyal and was bringing her out of the enemy's country. The court disposed of the case adversely to the claimant by saying:

"If the allegations of the claimant are true, *he postponed his effort to escape too long to derive any benefit from it.* The law does not permit such delay."

The Gray Jacket, 5 Wall, 342, 368.

The implications from what was said in the above cases seem to be clear, and to the effect that had the claims been free from the charge of laches and properly proved, the court would have recognized and supported them.

In similar cases where claims were *bona fide*, they have been sustained (*The Onderneeming*, 5 C. Rob., 7, *note*; *The Indian Chief*, 3 C. Rob., 20; *The Snelle Zeylder*, 3 C. Rob., 21, *note*; *The Ocean*, 5 C. Rob., 91; *The Frances*, 2 Gall., 616; *The Juffrow Catharina*, 5 C. Rob., 141).

In the cases of vessels which have set out on voyages after a declaration of war it is settled that the court will not look behind the flag, even to see a neutral owner. The neutral in such cases has had, and has voluntarily relinquished, his right and opportunity to take the ship out from under the enemy's flag. Why should the court, after capture, do it for him?

But it is believed no case will be found, certainly no recent case, where a neutral ship has set out before war and without any opportunity on the part of her

owner to take her back under his own flag, has been condemned upon a refusal to inquire into the real facts of ownership. It would be contrary to the modern spirit to pounce upon a ship and condemn her, if she was *bona fide* neutral and had a really satisfactory explanation for being caught, without notice or knowledge of war, under an enemy's flag. Suppose such a neutral, on the first information of war, changed her back in good faith to the register of his own country, but could not reach the ship to advise the master, and for want of such knowledge the enemy's flag continued to fly until capture, over a boat which was in fact neutral, would a prize court, at this time, refuse to adjudge the neutrality, if satisfied of the facts?

Prize law, as a branch of the law of nations, should not be administered with a grudging recognition of real equities, much less with a total disregard of them; but liberally, equitably, and with due regard for the private rights of unfortunate persons of other nationalities, whose property, through no fault of their own, is proceeded against, and who themselves, if not actually neutral, at least are not enemies in any real sense.

This court, it should be said, has always been willing to examine a neutral claim, even before the doctrine that neutral goods are free under an enemy's flag became generally acknowledged. It was held that the court should examine into the fact of the alleged neutral claim to cargo and, if established, should restore it, whatever the result of the case was as to the ship (*The Frances*, 8 Cranch, 54; *The Mary*, 9 Cranch, 126; *The Neride*, 9 Cranch, 338; *The Science*, 5 Wall., 178; *El Telegrafo*, Newb., 383; 25 Fed. Cas., 1008; *The Harrison*, 1 Wheat., 298; *The Merrimack*, 8 Cranch, 316).

Another analogy may, perhaps, be invoked. Neutrals who continue to reside in an enemy country and trade there after an outbreak of war become tainted with an enemy

status, and their goods, if found afloat, may be seized as those of enemies.

But if within a reasonable time after war begins such neutrals take steps to close up their business and remove themselves and their property from the enemy country, the hostile character does not attach to them, and their property, if captured, will be restored as that of *bona fide* neutrals (*Twiss, Law of Nations in Time of War*, § 154; *The Frances*, 2 Gall., 616; *The Ocean*, 5 C. Rob., 91; *The Indian Chief*, 3 C. Rob., 20; *The Snelle Zeylder*, 3 C. Rob., 21, *note*). This principle was acted on by Judge Locke in the claim of Dussaq & Co., a French firm, at Havana, whose goods seized on the *Panama* were restored to them, and by Judge Brawley in relation to a similar claim by Carlos Armstrong, of Ponce, Porto Rico, whose goods were captured on the *Rita*, but subsequently restored. Both cases were decided without opinions.

In the cases now before the court the facts are peculiar and unprecedented. The analogies even of other cases are not precisely applicable. The evident equity and good faith of the claims, however, appeal to the favorable consideration of the court. The intention of the Congress would be clearly defeated if these poor fishermen are to be held as enemies with the like force and effect as the Spanish armed and naval forces, which alone in the resolution are treated as enemies. With the people of Cuba, the merchants, mechanics, artisans, farmers, coasting and fishing boat owners, and the lowly fishermen, this great nation had no quarrel. Why, then, should its national vessels be permitted to capture their property and itself to take a share of the proceeds? Individuals of the nation would be unwilling to do it. The claim of neutrality, if nothing else, should prevent the consummation of such a great wrong.

POINT FIFTH.

IF THE FACTS IN CONNECTION WITH THE DEFENSE OF IMMUNITY BY REASON OF CUBAN OWNERSHIP BE CONSIDERED AS IN DOUBT ON THE PREPARATORY EVIDENCE, THE COURT SHOULD ORDER FURTHER PROOF.

(a.) The rule with regard to further proofs is stated by Mr. Justice Story in his essay on the *Practice in Prize Cases* (1 Wheat., Appendix, pp. 494, 504) as follows:

"The most ordinary cases of further proof are where the cause appears doubtful upon the original papers and the answers to the standing interrogatories, and in such cases, if the parties have conducted themselves with good faith, and the error or deficiency may be referred to honest ignorance or mistake, the court will indulge them with time to supply the defects by the introduction of new evidence. But further proof is in no case a matter of right, and rests in the sound discretion of the court. Further proof is in all cases necessary, * * * in all cases where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence in general, induces any doubt of the proprietary interest, the legality of the trade, or the integrity of the transaction."

In the letter from Sir W. Scott and Sir J. Nicholl to Mr. Jay, then minister to England, dated September 10, 1794, outlining the jurisdiction and practice in prize cases, it is stated:

"Upon an appeal, fresh evidence may be introduced if, upon hearing the cause, the lords of appeal shall be of opinion that the case is of such doubt as that farther proof ought to have been ordered by the court below."

Upton, Marine Warfare and Prize (Appendix), p. 473.

Further proof may be allowed upon appeal as well as in the trial court. This court has frequently ordered new proofs where the right disposition of the cause was left in

doubt by the record (*The Sir Wm. Peel*, 5 Wall., 517, 534; *The Mary*, 9 Cranch, 126, 140; *The Frances*, 8 Cranch, 354; 9 do., 183; *The Venus*, 1 Wheat., 112; *The London Packet*, 2 Wheat., 372; *The Sally Magee*, 3 Wall., 451).

(**b.**) The Government appears to contend that no claim of Cuban ownership can be sustained without an allegation that the particular Cubans in question were in sympathy with and gave aid and comfort to the Cuban insurgents; and that as no statement of sympathy with or participation in the rebellion by these owners is made in the claim or test affidavit, an order for further proofs would be improper. There is no qualification of this kind, however, in the resolution. It recognized the freedom of all Cubans. The Congress was apparently willing to believe that those who had no opinions, or even adverse private opinions, on the subject of independence, if they were not allied with the Spanish armed or naval forces, would make good Cuban citizens, and in the finish would approve the actions of the United States.

The President, in a letter to the Secretary of War dated July 18, 1898, stated the war was not waged against any class of Cubans:

> "We come not to make war upon the inhabitants of Cuba, *nor upon any party or faction among them*, but to protect them in their homes, in their employments, and in their personal and religious rights."

But if sympathy for or active aid to the insurrection was necessary to constitute a man or woman a "Cuban," the absence of an allegation that these owners were that kind of Cubans should prove no bar to the introduction of evidence on the subject. It must be borne in mind that the pleadings in prize practice are most brief and informal. The libel merely avers the capture, and that the property belongs to enemies, and is lawful prize, while the claim merely sets forth the ownership, and denies that the prop-

erty is lawful prize. No answer is permitted to be filed; but any valid ground of exemption may be urged and proved under the general denial of prize contained in the claim. So here the issue of prize or no prize, raised by the claim, is sufficient to permit an inquiry on any branch of the claim of neutrality that the court may consider requires further investigation.

There is, perhaps, no impropriety in saying that if new proofs are ordered, the counsel for the claimants understand it will be made to appear that the claimants were in fact sympathetic with the rebellion and our action toward it, and that they and their families actually aided it so far as lay in their power.

POINT SIXTH.

THE RESTORATION OF THE PROCEEDS OF THE BOATS SHOULD BE ACCOMPANIED BY DAMAGES FOR WRONGFUL CAPTURE AND DETENTION.

Every capture is at the peril of the captors. Just grounds for the capture and detention must appear: otherwise the captors are liable for damages (The *Resolution*, 2 Dall., 1; The *Grand Sachem*, 3 Dall., 333; The *Charming Betsy*, 2 Cranch, 64; *Maley vs. Chattuck*, 3 Cranch, 458; The *Amiable Nancy*, 3 Wheat., 546; *British Consul vs. Thompson*, Bee, 142). If, however, there was probable cause for the detention, it is proper to submit the cause to the prize tribunal, which may refuse damages though it acquits the vessel (The *Olinde Rodrigues*, 174 U. S., 510; The *George*, 1 Mason, 26).

On the facts in these cases there was no probable cause for the captures: (*a*) because coast-fishing boats of this class are well known to be exempt from capture; (*b*) because the captures in any view were premature and contrary to recent practice, preceding, as they did, a notice of the existence of war (4 *Calvo*, 5th ed., p. 46); and (*c*) because it appeared from their papers, found on board, that they were Cuban

vessels, and the Cubans had been previously recognized as independent, and were then in substance and effect our allies, to the knowledge of those who effected the captures.

The cases are of peculiar hardship. The small owners (in one of the cases a widow) have suffered losses which would not be made good by the mere restoration of the proceeds of the sale of the boats. But small amounts were realized on the sales in Key West, where there was no demand for boats of this build, while the cost of replacing vessels supplied with large tanks for the preservation of the fish alive must plainly have been very large. Even an award of damages would not fully repair the injuries done; but, at the least, the fullest reparation possible should be made.

LAST POINT.

THE DECREES APPEALED FROM SHOULD BE REVERSED WITH DAMAGES AND COSTS; OR, IN THE ALTERNATIVE, AN ORDER SHOULD BE MADE FOR FURTHER PROOFS.

Respectfully submitted.

CONVERS & KIRLIN,
Proctors for Paquete Habana and Lola.

J. PARKER KIRLIN, *Advocate.*

WASHINGTON, *November* 4, 1899.

APPENDIX.

I.

RESOLUTION RECOGNIZING CUBAN INDEPENDENCE.

(Statutes at Large, vol. 30, part 2, p. 738.)

(No. 24.)—Joint resolution for the recognition of the independence of the people of Cuba, demanding that the government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited; therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled:

First. That the people of the island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

Approved April 20, 1898.

II.

ACT DECLARING THAT WAR EXISTS.

(30 Stat. at Large, part 2, ch. 189).

AN ACT declaring that war exists between the United States of America and the Kingdom of Spain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this act into effect.

Approved April 25, 1898.

III.

Conseil d' Etat 10 juin 1872.

(*La Palme.*)

Par décision du 9 février 1871, le conseil provisoire des prises de Bordeaux a déclaré de bonne prise, ainsi que sa cargaison, le navire *la Palme*, capturé le 15 janvier précédent, par l'aviso à vapeur *le Bouragne.*

Pourvoi devant le Conseil d'Etat, contre cette décision, par la société de commerce des Missions protestantes, ayant son siége à Bâle (Suisse) laquelle a soutenu qu 'elle était propriétaire du navire et de sa cargaison.

Le Président de la Republique Française, Etc.—Vu la lettre en date du 8 Sept., 1870, par laquelle le ministre de la Confédération suisse, à Paris, fait connaître au ministre des affaires étrangères, en lui demandant d'en avertir les croiseurs français que le navire *la Palme* et sa cargaison appartiennent à la société des Missions de Bâle, société dont les ressources proviennent de souscriptions volontaires recueillies dans toutes les parties de la Suisse: que le Conseil fédéral n'autorisant pas les navires appartenant à des Suisses à porter le pavillon fédéral, la Société des Missions a dû adopter, lors de l'achat du navire en 1866, le pavillon hanovrien, qui depuis a été remplacé par le pavillon allemand; Vu

une dépêche du ministre de la marine, en date du 29 déc, 1854, de laquelle il résulte qu'à cette époque le gouvernement français avait déclaré ne pas reconnaître à la Suisse le droit d'avoir en pavillon maritime que sa situation géographique ne lui permettait ni de surveiller, ni de protéger; Vu les pièces en date des 11 et 19 mars, 20 et 22 avril 1871, desquelles il résulte qu 'en considération, d'une part, des justifications de propriété produites par la Société des Missions de Bâle et de la nécessité où elle s'est trouveé de prendre un pavillon étranger; d'autre part, des circonstances particulières qui recommendaient à cette époque les sujets suisses à la bienveillance du gouvernment français, le commandant supérieur de la marine à Dunkerque a ordonné que le bâtiment serait remis à ses propriétaires, moyennant un cautionnement de 26,000 fr.; Vu les observations en date des 6 janvier et 16 avril, 1872, par lesquelles le ministre de la marine et le ministre des affaires étrangères estiment qu'en raison des circonstances tout exceptionnelles qui mettaient la société requérante dans l'impossibilité d'avoir un pavillon national, et en consideration des services rendus par la Suisse à une armeé française pendant la guerre, il convient de se départir vis-à-vis de la Société des Missions du droit qui appartient au gouvernement de déclarer de bonne prise tout bâtiment naviguant sous pavillon ennemi: Vu le reglement du 26 juillet 1778: Vu le décret du 28 avril 1856, portant approbation de la déclaration du 16 avril 1856. Vu la déclaration du 20 juillet 1870: Vu le décret du 29 sept 1870: Considérant qu'il est établi par l'instruction que le navire *la Palme* et sa cargaison appartenaient à la Société Protestante des Missions de Bâle: Que si le navire portait le pavillon allemand c'est parceque la Confédération suisse n'ayant pas de pavillon maritime, la Société des missions avait é'té obligée après avoir acheté le navire en 1866, de lui faire porter un pavillon étranger et de le faire immatriculer dans un port de mer sous le nom d'un de ses correspondants;—Que, depuis cette

époque, et notamment dans le dernier voyage, la société n'a employé le navire que pour ses relations avec les missions protestantes qu'elle entretient sur les côtes d'Afrique : Qu'en raison de les circonstances exceptionelles, et en consideration des services rendus par la Suisse à une armeé française pendant la guerre, il convient de se départir vis-à-vis de la Société des Mission Protestantes de Bâle, du droit qui appartient au gouvernement français de déclarer de bonne prise tout navire naviguant sous pavillon ennemi :—Art. 1er La décision attaquée est annuleé. Art. 2 Il est accordé décharge du cautionnement qui a été souscrit, et les sommes qui auraient pu être verseés à ce titre seront restitueés.

Du 10 juin 1872.—Comm. faisant fonct de cons. d'état.—M. Barbeau, rapp.

(Recueil Général des Lois et des Arrêts.—Sirey, De Villeneuve, et Carette 1873, II. 237.)

IV.

Council of State, 10th of June, 1872.

(*The Palme Translation.*)

By decision of February 9, 1871, the Provisional Prize Council of Bordeaux declared the ship *The Palme*, captured January 15 preceding by the steam dispatch boat *Bouragne*, good prize, together with its cargo.

Appeal to the Council of State against this decision by the Commercial Society of the Protestant Missions, having its seat at Basel (Switzerland), which affirmed that it was the owner of the vessel and its cargo.

The President of the French Republic, etc.: In view of the letter bearing date September 8, 1870, by which the minister of the Swiss Confederation at Paris makes known to the minister of foreign affairs in asking him to notify thereof the French cruisers that the ship *The Palme* and its

cargo belonged to the Society of Missions of Basel, a society whose resources are derived from voluntary subscriptions received from all parts of Switzerland, that as the federal council does not authorize vessels belonging to Swiss subjects to fly the federal flag, the Society of Missions had to adopt at the time of the purchase of the vessel, in 1866, the Hanoverian flag, which has since been replaced by the German flag. In view of a dispatch of the minister of marine, bearing date December 29, 1854, from which it appears that at that time the French government had declared that it did not recognize that Switzerland had the right to have a maritime flag which its geographical situation did not allow it either to watch or to protect; in view of the documents bearing date the 11th and 19th of March, 20th and 22d of April, 1871, from which it appears that in consideration on one part of the proofs of property presented by the Society of Missions of Basel and in the necessity in which it was to take a foreign flag; on the other part the particular circumstances which recommended at that time Swiss subjects to the good will of the French government, the superior commandant of the navy at Dunkirk ordered that the vessel should be restored to its owners upon the furnishing of a bond for 26,000 francs; in view of the observations dated January 6 and April 16, 1872, by which the minister of marine and the minister of foreign affairs state that by reason of the very exceptional circumstances which place the petitioning society in the impossibility of having a national flag and in consideration of the services rendered by Switzerland to a French army during the war, it is proper as concerns the Society of Missions to waive the right which belongs to the government to declare good prize all vessels navigating under the flag of the enemy; in view of the ruling of July 26, 1778; in view of the decree of April 28, 1856, approving the declaration of April 16, 1856; in view of the declaration of July 20, 1870; in view of the decree of Sep-

tember 29, 1870; considering that it is established by the inquiry that the ship *The Palme* and its cargo belong to the Protestant Society of Missions of Basel; that if the ship flew the German flag, it is because the Swiss Confederation, not having a maritime flag, the Society of Missions had been obliged, after having bought the vessel, in 1866, to have it fly a foreign flag and to have it registered in a seaport under the name of one of its correspondents; that since that time, and especially in the last voyage, the society has used the vessel only for its relations with the Protestant Missions, which it supports on the coast of Africa; that, by reason of these exceptional circumstances and in consideration of the services rendered by Switzerland to a French army during the war, it is proper, as concerns the Society of Protestant Missions of Basel, to waive the right which pertains to the French government to declare good prize all ships navigating under an enemy flag: Article first, the decision attacked is annulled; article second, the bond which has been furnished is discharged, and the sums which may have been paid under it will be restituted.

Of the 10th of June, 1872.—Committee exercising the functions of the council of State. M. Barbeau Rapporteur.

V.

STIPULATION TO ABIDE THE EVENT.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA.

THE UNITED STATES
against
THE PAQUETE HABANA.

THE SAME
against
THE QUATRE DE SETIEMBRE.

It is stipulated and agreed between the United States and the claimants of the above-named fishing vessels that the case of The United States against *The Quatre de Setiembre* shall abide the event of the appeal taken by the claimant in the case of The United States against *The Paquete Habana* (No. 395, October term, 1899), and that the appeal in said last-named case shall determine the right of the United States to the proceeds of the vessel in the other case.

It is understood and agreed, however, that should the decision of the Supreme Court in the case of the *Paquete Habana* be based in whole or in part upon the defense of Cuban ownership, it shall not be decisive of the rights either of the captors or of the claimants to the proceeds of the *Quatre de Setiembre* in so far as that defense may be involved in the latter case.

The time of the claimant to take and perfect his appeal in the case of The United States against the *Quatre de Setiembre* is hereby extended until one month after the decision of the Supreme Court of the United States upon the appeal taken in the case of The United States against the *Paquete Habana*.

It is further stipulated and agreed that this stipulation shall form a part of the record in both of the above-entitled cases.

Dated September 26, 1899.

EDWARD K. JONES,
Special Counsel for the United States.

CONVERS & KIRLIN,
Counsel for the Claimants.

VI.

STIPULATION TO ABIDE THE EVENT.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA.

THE UNITED STATES
against
THE LOLA.

THE SAME
against
THE ENGRACIA.

THE SAME
against
THE SEVERITA.

THE SAME
against
THE ANTONIO Y PACO.

THE SAME
against
THE FERNANDITO.

THE SAME
against
THE SANTIAGO APOSTOL.

THE SAME
against
THE ORIENTE.

THE SAME
against
THE ANTONIO SUAREZ.

THE SAME
against
THE ESPANA.

THE SAME
against
THE PODER DE DIOS.

It is stipulated and agreed between the United States and the claimants of the above-named fishing vessels that the cases of The United States against The Engracia, The Same against The Severite, The Same against The Antonio y Paco, The Same against The Fernandito, The Same against The Santiago Apostol, The Same against The Oriente, The Same against The Antonio Suarez, The Same against The Espana, and The Same against The Poder de Dios shall abide the event of the appeal taken by the claimant in the case of The United States against The Lola (No. 396, Oct. term, 1899), and that the appeal in said last-named case shall determine the right of the United States to the proceeds of the vessels in the other cases named.

It is understood and agreed, however, that should the decision of the Supreme Court in the case of the Lola be based in whole or in part upon the defense of Cuban ownership, it shall not be decisive of the right either of the captors or of the claimants to the proceeds of the vessels in so far as that defense may be involved in the other cases above named.

The time of the claimants to take and perfect their appeals in the cases of The United States against The Engracia,

The Same against The Severite, The Same against The Antonio y Paco, The Same against The Fernandito, The Same against The Santiago Apostol, The Same against The Oriente, The Same against The Antonio Suarez, The Same against The Espana, and The Same against The Poder de Dios is hereby extended until one month after the decision of the Supreme Court of the United States upon the appeal taken in the case of The United States against The Lola.

It is further stipulated and agreed that this stipulation shall form a part of the record on appeal in all of the above-entitled cases.

EDWARD K. JONES,
Special Counsel for the United States.
CONVERS & KIRLIN,
Counsel for the Claimants.

Dated September 26, 1899.

No. 395 and 396.
Sup. Ct. Brf. of Merlin for Oct. 1899.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

Filed Nov. 13, 1899.

The Spanish Smack "PAQUETE HABANA," JUAN PASOS, Claimant-Appellant,
AGAINST
THE UNITED STATES.
No. 395.

The Spanish Schooner "LOLA," THOMAS BETANCOURT, Claimant-Appellant,
AGAINST
THE UNITED STATES.
No. 396.

SUPPLEMENTAL BRIEF FOR CLAIMANTS-APPELLANTS.

(1.) JURISDICTION.

It was suggested upon the argument of these cases that if Section 695 of the Revised Statutes was still in force, the Court would be without jurisdiction to entertain the appeals, because of the fact that the amount in dispute in each case taken separately is not shown to exceed $2,000; and that the Court could not regard the stipulation, between the claimants and the Government, that ten other cases should abide the event of the above two, as effecting

such a consolidation as would bring the amount in dispute up to $2,000 within the meaning of the statute.

No question in regard to jurisdiction was raised in the original brief of the Government. Both sides assumed there was no controversy on this point. Further investigation, it is believed, will satisfy the Court that jurisdiction actually exists.

The Judiciary Act of 1891 (26 Statutes at Large, 828), establishing the Circuit Court of Appeals, and apportioning the appellate jurisdiction between that court and the Supreme Court, operated as a repeal of Section 695 of the Revised Statutes, in so far as it placed a limitation on the right of appeal to this Court in cases of prize.

This appears from a comparison of Sections 4, 5 and 14 of the Act of 1891.

Section 4 provides:

* * * "But *all appeals* by writ of error or otherwise *from said District Courts shall only be subject to review in the Supreme Court* of the United States, or in the Circuit Court of Appeals hereby established, *as is hereinafter provided*, and the review by appeal by a writ of error or otherwise from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established according to the provisions of this act regulating the same."

Section 5: "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

(1.) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

(2.) From the final sentences and decrees in prize causes.

(3.) In cases of conviction of a capital or otherwise infamous crime.

(4.) In any case that involves the construction or application of the Constitution of the United States.

(5.) In any case in which the constitutionality or any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

(6.) In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

Section 14, after expressly repealing Section 691 of the Revised Statutes, and Section 3 of the Act of February 16, 1875, concludes:

"And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding Sections 5 and 6 of this act are hereby repealed."

The only cases in which the jurisdiction of this Court as stated in that act is made to depend upon the amount involved are those under Section 6, in which an appeal to the Circuit Court of Appeals is allowed, but where the judgment of that Court is not made final. In such cases there is of right an appeal or writ of error to this Court where the matter in controversy exceeds $1,000, besides costs.

There is no limitation upon the exercise of the different branches of jurisdiction conferred on this Court by Section 5 by reason of the amount in controversy.

In cases where the jurisdiction of the Court is in issue, or which involve the construction or application of the Constitution, or where the constitutionality of the law of the United States, or the validity or construction of a treaty made under its authority is drawn in question, or where the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States, this Court has jurisdiction of appeals or writs of error, irrespective of the amounts in controversy.

The second of the six divisions of jurisdiction conferred under the fifth section of the Statute, is appeals from the District Courts in prize cases.

It is very unreasonable to suppose Congress intended that in five out of six classes of cases the amount in controversy should be immaterial, as affecting the jurisdiction,

while in the one other class of cases, covered by the same section of the act, the jurisdiction should be limited to appeals in which the sum in controversy exceeds $2,000—a different limit than that provided under the sixth section of the same act for cases in which there is a right of appeal to this Court from the Circuit Court of Appeals.

The general subject appears to have received consideration in the case of the *United States* v. *Rider*, 163 U. S., 101, 138, 139, where the Chief Justice, after reviewing the Court of Appeals Act, used this language:

"Thus appellate jurisdiction was given in all criminal cases by writ of error either from this Court or from the Circuit Court of Appeals, *and in all civil cases by appeal or error without regard to the amount in controversy*, except as to appeals or writ of error to or from the Circuit Court of Appeals in cases not made final, as specified in Section 6."

Section 695 of the Revised Statutes, we submit, is within the general repealing clause of Section 14 of the Act of 1891, as "inconsistent with the provisions for review by appeals * * * in the preceding sections five and six of this Act."

Section 4 provides "that all appeals * * * from said District Courts shall only be subject to review in the Supreme Court * * * as is hereinafter provided."

And Section 5 provides "that appeals * * * may be taken from the District Courts * * * direct to the Supreme Court, in the following cases:

(2.) "From the final sentences and decrees in prize causes."

The provision of Section 4 that "appeals from the District Courts should only be subject to review in the Supreme Court, as is hereinafter provided," plainly means that they *shall* be subject to review *as therein* provided; and the provision of the fifth section that appeals may be taken from the District Court direct to the Supreme Court "from the final sentences and decrees in prize causes" can only mean, in the ordinary use of language, from *all* such final sentences and decrees.

The specific grant of jurisdiction to this Court of appeals from all final sentences and decrees in prize causes, is plainly inconsistent with Section 695, which limited the jurisdiction of this Court in such cause to those where the amount involved exceeded $2,000, and hence Section 695 falls under the ban of Section 14 of the Act of 1891, and is, by that section, repealed.

(2.) WHO ARE "THE PEOPLE OF THE ISLAND OF CUBA"?

As a further word on this subject has been said in the supplemental brief for the Government and the captors, the appellant may perhaps be permitted a few further observations on the same subject.

It has been argued in the principal brief for the appellants that the "people of the Island of Cuba," as referred to in the joint resolution of the Congress, recognizing their freedom and independence, were the ordinary commercial inhabitants of the Island regularly residing and domiciled there on April 20, 1898.

The Spanish armed and naval forces are not properly to be described as persons residing or domiciled in the Island, and hence, by this test alone, would be excluded from the privileges and immunities properly belonging to the people of the Island, by reason of the recognition of their independence.

By this test, there could be not a doubt that the owners of the above smacks are Cubans in the sense of the resolution. To begin with, it is sworn in the test affidavit that these owners are Cubans, and it is the special function of the test affidavit to declare the nationality and residence of the claimants. It further appears from the preparatory evidence that the owners of the vessels were domiciled and resided for many years in Cuba, and *prima facie*, at least, that they were commercial as distinguished from military or naval people.

Certainly there can be no question of the non military character of Justa Galban, widow, the owner of the *Paquete Habana*, nor, as we submit, is there any reasonable question as to Severo Gonzales, the owner of the

Lola. He had been the owner of this boat for at least ten years and had resided in Havana during that time, if not longer.

Neither of the boats had Spanish Royal Licenses.

Both had merely insular licenses granted by the authorities in Cuba authorizing the boats to fish only upon the coasts of Cuba or upon coasts of the near neighboring countries (see Original Licenses in the Muster Rolls on file). Both of the boats had been built in this country, and there is no suggestion that either of them had ever seen Spain.

The boats, therefore, were Cuban vessels and the owners, by residence and domicile, were Cuban people.

The statements of the captains in the preparatory evidence, that the owners were Spaniards, should be read in the light of the facts that the boats had left Cuba on their fishing trip before Cuban independence was recognized; that they were captured by the blockading squadron and kept prisoners of war until after they were examined upon the standing interrogatories, and hence were ignorant of any change of the legal status of the people of Cuba, and gave their answers without having benefit of counsel. It should also be carried in mind that the same witnesses stated the *facts* of residence and domicile in the preparatory evidence, and that the statement that the owners were Spaniards was not the evidence of a fact, but was a legal conclusion given in ignorance of a vital and essential fact upon which the answers ought to have been based.

It is further apparent from the evidence of the captains that their statements that the owners were Spaniards were based upon the fact that one or both of them was born in Spain. But it seems plain that in determining who are or who are not "people of the Island of Cuba" the test of nativity cannot be applied, whatever other test may be. To limit the scope of the words "the people of Cuba" to those who are born in Cuba, would be to deprive a vast number of the inhabitants of that Island of the status Congress evidently intended to confer upon them.

Nor, it is submitted, should a state of mind be the test of whether a person is or is not a Cuban. The Government maintains that only those persons who were in sympathy with the insurrection, or with the action of this Government towards it, should be considered as entitled to the privileges which attach to Cubans under the resolution. In case of a conflict of evidence as to whether persons were or were not sympathetic with the revolution, it would be impossible for the Court to read the minds and consciences of those claiming to be Cubans, in order to determine the truthfulness of their claims.

Though it is believed that the owners of these vessels, like the owners of the other coasting vessels who were referred to on the argument, *were* sympathetic with the Revolution and its aim, and that leave to take further proofs would in these cases, as in the others, lead to evidence of the fact, it is, nevertheless, submitted with all possible deference, that the proofs of residence and domicile already in the records are sufficient to establish the status of these claimants as Cubans. In the case of the *Paquete Habana*, at least, it would be a hardship to impose the burden of further proofs.

(3.) THE IMMUNITY OF FISHING SMACKS UNDER THE GENERAL LAW.

Counsel for the claimants have received from the Government a copy of an additional memorandum submitted to the Court on November 11th, in which the orders of the Navy Department respecting the immunity of fishing vessels during the Mexican War appear. These orders are in a volume of confidential correspondence in the library of the Navy Department and are as follows:

"U. S. SHIP CUMBERLAND,
OFF BRAZOS, SANTIAGO,
May 14, 1846.

"Sir * * * Enclosed is a copy of my instructions to the commanders of vessels of the Home Squadron show-

ing the principles to be observed in the blockade of the Mexican ports.

"I am, very respectfully, etc.,
"D. CONNER,
"Comd'g Home Squadron.

"Hon. GEO. BANCROFT,
"Secretary of the Navy,
"Washington.

"*Enclosure.*"

"(*Instructions to be observed by officers commanding vessels*, &c.)

"Sir * * * Mexican boats engaged exclusively in fishing, on any part of the coast will be allowed to pursue their labours unmolested. * * *

"D. CONNER,
"Comd'g Home Squadron.

"U. S. SHIP CUMBERLAND,
"OFF BRAZOS, SANTIAGO,
"May 14, 1846."

"*Approved by the Department, June* 10, 1846."

It appears from the foregoing that the statements in the standard international law books respecting our practice during the Mexican War are correct.

The order of Commodore Stockton referred to in the report of the Secretary of the Navy for 1846 (Navy Reports, 1846–1848, pp. 673, 674): "You will capture all vessels under the Mexican flag that you may be able to take"—was either issued prior to the approval of the Department on June 10, 1846, of Commander Conner's order granting immunity to fishing vessels, or, if actually dated later (the report is not accessible to counsel for claimants), it must be deemed to relate to vessels other than fishing boats.

The only further reference we would add to the authorities respecting the immunity of coast fishing vessels from capture, under the rules of Internationl Law, is 3 *Wharton's International Law Digest*, Sec. 345, p. 316, where, by implication at least, he recognizes the existence of the general rule.

It is not necessary that the claimant should be able to cite an adjudicated case holding that the principle con-

tended for is a rule of International Law; though, happily, we have been able to so (Original Brief, p. 14). In a certain sense, there is no positive sanction for the rules of international law as there is for principles of municipal law. Long observance of a rule or custom, its embodiment in treaties, its recognition in the standard text books on International Law, and the justice, equity and convenience of a principle establish it as a rule which the Court, in a case involving private rights, may recognize and enforce. If this were not so, there could be no advancement in the principles of International Law except by the great Conferences of the Powers and by the most formal public Conventions; and these, we know, are by no means the only sources from which such principles are derived.

November 11, 1899.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimant.

J. PARKER KIRLIN,
Advocate.

No. 395 and 396.

(Brf. of Kirlin for Opps. (on mo.)

IN THE SUPREME COURT OF THE UNITED STATES.

Filed Jan. 22, 1900.

OCTOBER TERM, 1899.

The Spanish Smack PAQUETE HABANA, JUAN PASOS, claimant, appellant,

AGAINST

THE UNITED STATES.

No. 395.

The Spanish Schooner LOLA, TOMAS BETANCOURT, claimant, apppellant,

AGAINST

THE UNITED STATES.

No. 396.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF OPPOSING MOTION TO MODIFY DECREES.

. The Solicitor General moves "to modify the decrees in these causes (*a*) by vacating the allowance of damages, or (*b*) so restricting such allowance as to make the damages merely compensatory."

(*a.*) No argument is now addressed to the Court against the allowance of damages that was not heard at the bar

on the hearing. That matter having had its day in Court, and having been decided, upon an exhaustive examination of authorities, which being accepted, could lead to no other logical result, nothing remains to be said upon it.

(*b.*) The second branch of the motion is, in substance, an invitation to the Court to announce, beforehand, the principles upon which the District Judge shall proceed in determining the amount of the damages.

The answer to that part of the application seems to be that it is premature. It must be assumed that the District Court is competent to ascertain and determine the amount the claimants have been damaged by an unauthorized capture. But if an error should be committed, there will be a remedy by a review of his decision for the correction of such error.

Objection is made to any modification of the decree, providing that the restoration of the proceeds, with an allowance of interest, shall be accepted as full compensation. The Court in Florida will be in a better position than this Court to determine whether thatrule would afford indemnity, because it can hear evidence as to whether the proceeds of sale came anywhere near equaling the real value of the boats. It is probable they did not, because there is no demand for such boats at Key West, or market for their fish if they were employed in the former trade. It has been reported that the boats were bought at Key West for trifling sums,and sold to Cubans again at the close of the war for far larger amounts than they yielded to the Prize Court. It is not asserted here that such is the fact; but it has been stated in a public way by others, and the Court below should be left free to investigate it. That Court can easily adjudge, after hearing the evidence and without any preliminary instructions, whether the proceeds of sale fairly represent the value of the vessels or not. If they do not, then surely the United States would not wish to force the claimants to accept such proceeds as compensation for a greater loss.

The Government was not at war with inoffensive Cuban fishermen, and should not object, but on the contrary

should be willing and eager to make good to them their real losses by reason of the unlawful captures, if such proceeds and interest would, in fact, be insufficient to do so.

January 20, 1900.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Appellants.

J. PARKER KIRLIN,
Advocate.